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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 538

EVERETT D. GREEN, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 27, 1956

CERTIORARI GRANTED NOVEMBER 19, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 589

EVERETT D. GREEN, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[1] [File endorsement omitted]

In United States District Court

ORDER INCARCERATING PETITIONER—Filed June 17, 1953
19-942

DISTRICT OF COLUMBIA,
County of Washington

To the Supt. of the Washington Asylum and Jail:

Receive into your custody the body of Everett D. Green herewith sent to you, being before me, Chris. J. Murphy, M. D., Acting Coroner of said County, and by a jury duly summoned at an inquest, held the 28th day of May, 1953 at the D. C. Morgue upon the body of Bettie Brown found guilty of the death of the said Bettie Brown according to the finding of the said inquest hereto attached, and safely keep in your said custody for further trial or until the further order of the Criminal Court of the District of Columbia.

Given under my hand and seal, this twenty-eighth day of May, 1953.

CHRIS J. MURPHY, M. D.,
Coroner.

Witness: Maurice F. Prestele, M. T. Zirkle.

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[2] [File endorsement omitted]

CORONER'S INQUISITION—Filed June 17, 1953

COUNTY OF WASHINGTON,
District of Columbia, set:

An inquisition taken at the D. C. Morgue in the County aforesaid, on the 28th day of May in the year of 1953 before me X. Chris J. Murphy, M. D., Acting Coroner of the said County, upon the view of the body of Betty Brown then and there lying dead, upon the oaths of F. J. Neff, Charles Campbell, J. J. Stuart, Edward Souder, M. T. Zirkle, M. F. Prestele, good and lawful men of the said County who, being sworn upon the Holy Evangelists of Almighty God, and charged to enquire when, where, how, and after what manner the said Betty Brown came to her death, do say upon their oaths that Betty Brown, white, female, 83 years, came

to her death as a result of pulmonary Edéma and acute trachea Bronchitis-Anoxia due to inhalation of hot irritating gases. (Other:) Chronic arteriosclerotic heart disease. She was pronounced dead at 8:10 a. m., May 26th, 1953.

We further state that she died in 1115 Massachusetts Avenue, N. W. as the result of a fire started by Everett E. Green, white, male, 63 years, who was found in the bath tub unconscious in the basement when firemen entered. He was arrested and appeared for the inquest.

We believe Everett E. Green responsible for the death of Bettie Brown and hold him for the action of the Grand Jury.

In Witness Whereof, as well as the aforesaid Coroner as the Jurors aforesaid, have to the Inquisition put their hands and seals on the day and year aforesaid and at the place aforesaid.

CHRIS J. MURPHY, M. D.,
Coroner (L.S.)

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[3] [File endorsement omitted]

In United States District Court for the District of Columbia
Holding a Criminal Term

Grand Jury Impanelled May 4, 1953. Sworn in on May 5, 1953

Criminal No. 1083-'53

Grand Jury No. 882-53

Arson

First Degree Murder

(22 D.C.C. 401, 2401)

THE UNITED STATES OF AMERICA

v.

EVERETT D. GREEN

INDICTMENT—Filed July 6, 1953

The Grand Jury charges:

On or about May 26, 1953, within the District of Columbia, Everett D. Green maliciously did burn, and cause to be

burned, a certain building known 1115 Massachusetts Avenue, Northwest, property of Gerald Freed.

SECOND COUNT:

On or about May 26, 1953, within the District of Columbia, Everett D. Green committed the offense of arson, that is to say, he maliciously did burn, and cause to be burned, a certain building known as 1115 Massachusetts Avenue, Northwest, property of Gerald Freed; and in perpetrating the offense of arson aforesaid, caused *Bettie Brown* to inhale certain gases, the inhalation of which resulted in her death, within the District of Columbia, on or about May 26, 1953.

(S.) LEO A. ROVER,
Attorney of the United States in and for the District of Columbia.

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[4] [File endorsement omitted]

In United States District Court for the District of Columbia

[Title omitted]

PLEA OF DEFENDANT—Filed July 13, 1953

On this 10th day of July, 1953, the defendant Everett D. Green, appearing in proper person and by his attorney H. Eugene Bryan, Esquire, being arraigned in open Court upon the indictment, the indictment being read to him, pleads Not Guilty thereto.

The defendant is remanded to the District of Columbia Jail.

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[5] [File endorsement omitted]

In United States District Court for the District of Columbia

VERDICT—Filed February 10, 1954

On this 10th day of February, 1954, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was

respited yesterday; whereupon the said jury, after hearing further of the evidence, and the instructions of the Court, Alternate Jurors Gladys Giles and Vernon Greene are discharged from further consideration in this case; and thereupon the jury upon their oath say that the defendant is guilty as indicted on count one and guilty of second degree murder on count two; whereupon each and every member of the jury is asked if that is his or her verdict and each and every member thereof says that the defendant is guilty as indicted on count one and guilty of second degree murder on count two.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District Jail.

By direction of CHARLES F. MCLAUGHLIN,
Presiding Judge,
Criminal Court #2.

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[6] [File endorsement omitted]

In United States District Court for the District of Columbia

Cr. No. 1083-53

UNITED STATES OF AMERICA

v.

EVERETT D. GREEN

On this 19th day of March, 1954 came the attorney for the government and the defendant appeared in person and by counsel, Eugene Bryan, Esquire.

JUDGMENT AND COMMITMENT—March 19, 1954

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Arson and First Degree Murder as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to

the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) year to Three (3) years on count one; Five (5) years to Twenty (20) years on count two, to run concurrently with the sentence imposed on count one.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

CHARLES F. MCLAUGHLIN,
United States District Judge.

---

[7] In United States District Court for the District of Columbia

Criminal No. 1083-53

UNITED STATES

vs.

EVERETT D. GREEN

ORDER AMENDING JUDGMENT AND COMMITMENT—March 31, 1954

It appearing to the Court that the second paragraph of the Judgment and Commitment entered herein on the 19th day of March, 1954, erroneously stated that the above named defendant had been found guilty of Arson and First Degree Murder, whereas it should have stated, Arson and Second Degree Murder.

It is this 31st day of March, 1954,

Ordered, that the said judgment and commitment be, and the same is hereby amended by striking that portion of the said judgment and commitment which appears in the second paragraph and reads as follows:

Arson and First Degree Murder

and in its place and stead the following is hereby substituted:

Arson and Second Degree Murder.

By the Court: CHARLES F. MCLAUGHLIN,
Judge.

[8] [File endorsement omitted]

In United States District Court for the District of Columbia
Washington, D. C.

[Title omitted]

NOTICE OF APPEAL—Filed April 9, 1954

Charge: Arson & Second Degree Murder, Appellant files Notice of Appeal, not being satisfied with the verdict of the jury in case No. 1083-53 United States vs Everett D. Green in finding him guilty of 2nd, Degree Murder and Arson in trial of Feb. 8th through Feb. 10th, 1954.

Subsequently due to the verdict of the jury, returned Feb. 10, 1954, the Honorable Judge Charles F. McLaughlin did on Mar. 19, 1954 sentence the Appellant to serve one to three years on Arson Charge and five to twenty years on Second Degree Murder charges to run concurrently.

[9] Appellant states that he has been deprived of his civil rights under the Sixth Amendment of the Constitution of the United States of America by the prosecution causing unnecessary delays in setting the first date of trial October 27-1953 before Judge James R. Kirkland and continued by the prosecution to and through the following dates, November 23, 1953, December 14, 1953, January 18, 1954 and finally to February 8th, 1954, when case was finally brought to trial before a jury presided over by Judge Charles F. McLaughlin. Appellant can prove that he did not set the house on fire and that the deceased Miss Betty Brown, eighty-three years old, did die a natural death about 12:30 a.m. May 26, 1953, about 6½ hours before the fire was discovered about 7 a.m. of the same date.

Respectfully submitted,

EVERETT D. GREEN.

[10] [File endorsement omitted]

In United States Court of Appeals for the District of Columbia Circuit

No. 12,188

EVERETT D. GREEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Mr. George Blow for appellant.

Mr. Lewis Carroll, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney, and *Thomas A. Flannery*, Assistant United States Attorney, were on the brief, for appellee.

Before WILBUR K. MILLER, PRETTYMAN and DANAHER, Circuit Judges. OPINION—decided January 20, 1955.

WILBUR K. MILLER, *Circuit Judge*: In the first count of an indictment, Everett Green was charged with arson.[1] In [11] the second, the grand jury alleged that the death of an elderly woman, Bettie Brown, resulted from the fire set by Green, and so accused him under § 22-2401, D. C. CODE (1951),[2] which defines the unpurposed killing of another in perpetrating arson as murder in the first degree.

---

[1] Section 22-401, D. C. CODE (1951), is as follows:

"Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building; or any steamboat, vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meeting-house, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than one year nor more than ten years. (Mar. 3, 1901, 31 Stat. 1323, ch. 854, § 820.)"

[2] Section 22-2401, D. C. CODE (1951), is as follows:

"Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice

In submitting the case to the jury under the second count, the trial judge instructed on both first and second degree murder. Found guilty of arson under the first count and of murder in the second degree under the second count, Green appeals only from the latter.

He says it was error to instruct the jury on second degree murder; that the verdict of guilty under that instruction shows the jury was unwilling to find him guilty of murder in [12] the first degree; that, therefore, had the erroneous second degree instruction not been given, he might well have been acquitted under the second count of the indictment. Thus, the sole question on this appeal is whether the trial judge erred to appellant's prejudice in instructing the jury on second degree murder.

Whether it was error to give that instruction depends on whether there was evidence to justify it; for we have held that under an indictment charging first degree murder done during the perpetration or attempted perpetration of one of the felonies enumerated in § 22-2401, the defendant may, if the evidence warrants it, be found guilty of the necessarily included offense of murder in the second degree.[3]

---

or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 798; June 12, 1940, 54 Stat. 347, ch. 339, § 1.)"

[3] *Goodall* v. *United States*, 86 U. S. App. D. C. 148, 180 F. (2d) 397 (1950). We said at page 151:

"Although the indictment charged murder in the first degree, the appellant could have been found guilty thereunder of murder in the second degree had the evidence warranted it, since a defendant may be found guilty of any offense necessarily included in the crime charged in the indictment. Rule 31(c), Federal Rules of Criminal Procedure, 18 U.S.C.A. But an instruction on a lesser included offense should not be given unless there is evidence to justify it. Burcham v. United States, 1947, 82 U. S. App. D. C. 283, 163 F. 2d 761. All the

The first degree murder section of the District of Columbia Code, set forth at length in footnote 2, *supra*, enlarges the common law definition of that crime by adding thereto, *inter alia*, the unproposed killing of another in perpetrating arson. So, when the evidence at a trial tends to show the defendant committed arson, and that the fire was the sole [13] cause of the victim's death, the defendant is either guilty of murder in the first degree or he is not guilty.

In the present case, the only evidence as to the cause of the victim's death was that of Dr. Richard M. Rosenberg, Deputy Coroner of the District of Columbia, who performed an autopsy on the body of the victim, Bettie Brown. He testified in part as follows:

> "Q. Did you ascertain the cause of death of the deceased Bettie Brown?
>
> A. I did.
>
> "Q. Would you state that, Doctor?
>
> A. The cause of her death was pulmonary edema. That means an accumulation of fluid in the lungs due to acute trachea bronchitis.
>
> "Q. Will you explain that?
>
> A. That means inflammation of the trachea, which is the tube that leads from the mouth to the lungs and the bronchi, which are the tubes that lead from the trachea into the lungs themselves. This system of tubes was acutely inflamed, due to lack of oxygen, anoxia, being due to the inhalation of hot irritating gases.
>
> "Q. And the primary cause of death was the inhalation of hot irritating gases?
>
> A. That is correct."

Dr. Rosenberg amplified the foregoing rather extensively in his testimony given under cross-examination by appellant's counsel, a part of which we quote:

> "Q. Doctor, did you find anything else wrong with this woman in the course of your examination?

---

testimony as to what occurred at the drug store pointed to murder in the first degree and nothing else. . . ."

See also *Sparf and Haven* v. *United States*, 156 U. S. 51 (1895); *Stevenson* v. *United States*, 162 U. S. 313 (1896); *Davis* v. *United States*, 165 U. S. 373 (1897).

A. Yes.

"Q. What?

A. She was suffering from rather advanced heart disease. The large blood vessel going off the heart, the aorta, was inflamed and dilated, and the coronaries, which are the arteries in the heart itself, were sclerosed or handened. She had some degeneration of the liver and also of the kidneys, and she had generalized arteriosclerosis, which means that she had generalized harden- [14] ing of the arteries.

"Q. Now, Doctor, isn't it a fact that she could have died as a result of this heart condition?

A. In the instant case, no.

* * * * *

"This woman was 83 years of age, and anyone of that age is bound to have degenerative changes in their [*sic*] organs. However, the condition found in her lungs was due to an acute and recent episode, plus the fact that 14% carbon monoxid. was found in her blood, which is proof that she had inhaled these hot gases, which were due to the fire and therefore contained carbon monoxide.

* * * * *

"Q. Then it is on the basis of Doctor Young's report that you made this conclusion as to her death?

A. No. My conclusion as to her death was based on what I found in her lungs, to wit, pulmonary edema, inflammation of the trachea and bronchi, and that I believe was due to the inhalation of hot irritating gases, and the presence of the carbon monoxide indicated to me that at the time of the fire the woman was alive.

"Q. Well, now, it indicated to you that at the time of the fire she was alive?

A. Yes.

"Q. Is there any question in your mind about that?

A. No, sir.

"Q. Is it possible under any circumstances that she may have been dead at the time of the fire?

A. No, sir.

* * * * *

"Q. Doctor, isn't it possible that this woman could have inhaled an amount of this smoke or gas and that she then had a heart attack and died of the heart attack?

A. I interpret that to mean she died of a heart attack, per se, that is, of itself. The answer is no. It is a known fact that everybody that dies dies because of heart failure, but the cause of heart failure in this case was induced by the condition that was caused in her lungs.

[15] "Q. It is possible that she could have died as a result of heart failure, though not induced by this lung condition, isn't it?

A. Not in the instant case; no.

* * * * *

"The only thing that the carbon monoxide indicated to me was a positive proof that at the time of this fire the woman was alive, that she hadn't had a heart attack and died prior to the inhalation of the smoke and hot gases.

"Q. And this carbon monoxide that is in the blood, that convinces you that she died subsequent to the start of the fire?

A. That is right; that she was alive when the fire started."

The quoted testimony, which was undisputed, shows beyond peradventure that Bettie Brown's death was caused by the fire in the house in which her body was found. There was ample evidence to the effect that the appellant set the fire. We said in the *Goodall* case, 86 U. S. App. D. C. at 151, 180 F. (2d) at 400, "All the testimony as to what occurred at the drug store pointed to murder in the first degree and nothing else." And so we there held that the question whether there had been only second degree murder should not have been submitted to the jury, and that Goodall was treated more favorably than he deserved when it was submitted.[4]

[4] The question of the propriety of the second degree instruction arose in that case because Goodall, who was convicted of first degree murder, assigned as error the court's failure to tell the jury that, if they believed him guilty of the killing but were in doubt whether he had been proved guilty of first or second degree murder, they should find him guilty of the lesser crime.

In the present case, as in the *Goodall* case, all the testimony as to what occurred in the burning house pointed to murder in the first degree and nothing else. Hence there [16] was no reason for a second degree instruction, and giving it was at least technically erroneous.[5]

It remains to determine whether the error requires reversal. The Government says there was no prejudice; that the trial judge in giving the second degree instruction treated Green more favorably than he deserved, just as in the *Goodall* case. That case is not parallel with this, because Goodall was convicted of murder in the first degree and of course could not have been prejudiced by the erroneous second degree instruction under which the jury refused to act.

Here, had the erroneous instruction under which he was convicted not been given, Green might have been found not guilty under the second count. In seeking a new trial at which—if the evidence is substantially as before—the jury will have no choice except to find him guilty of first degree murder or to acquit him, Green is manifestly taking a desperate chance. He may suffer the death penalty. At oral argument we inquired of his counsel whether Green clearly understood the possible consequence of success on this appeal, and were told the appellant, who is 64 years of age, says he prefers death to spending the rest of his life in prison. He is entitled to a new trial.

Reversed and remanded.

[17] PRETTYMAN, *Circuit Judge*, dissenting: I would affirm in this case. I agree with the Government's contention, as stated by the court, that even if the instruction was in error the trial judge in giving it "treated Green more favorably than he deserved, just as in the *Goodall* case." In the language of Rule 52(a) of the Criminal Rules, the error

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[5] There are, of course, cases in which the evidence warrants a second degree murder instruction under an indictment charging murder in the first degree done in perpetrating or attempting to perpetrate one of the other felonies listed in the statute. For example, in the recent case of *Kitchen* v. *United States*, No. 12,229, decided January 13, 1955, we upheld a conviction of murder in the second degree under an indictment which charged killing another during robbery. The evidence was such as to warrant the jury in finding, as it did, that although Kitchen killed the victim, he did not rob him.

"does not affect substantial rights" of the defendant and should "be disregarded."

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[18] [File endorsement omitted]

In United States Court of Appeals for the District of Columbia Circuit

MANDATE—February 23, 1955

THE UNITED STATES OF AMERICA
The President of the United States of America, ss:

To the honorable the Judges of the United States District Court for the District of Columbia, Greeting:

Whereas, lately in the United States District Court for the District of Columbia, before you or some of you, in a cause between The United States of America, plaintiff, and Everett D. Green, defendant, Criminal No. *1083-53*, wherein the judgment of the said District Court entered in said cause on the 19th day of March, 1954, is in the following words, viz:

"On this 19th day of March, 1954 came the attorney for the government and the defendant appeared in person and by counsel, Eugene Bryan, Esquire.

"IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Arson and First Degree Murder as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

"IT IS ADJUDGED that the defendant is guilty as charged and convicted.

"IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

> One (1) years to Three (3) years on count one; Five (5) years to Twenty (20) years on count two, to run concurrently with the sentence imposed on count one.

"IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

CHARLES F. MCLAUGHLIN, *United States District Judge.*"

and wherein the following order of the said District Court was entered on the 31st day of March, 1954:

"It appearing to the Court that the second paragraph of the Judgment and Commitment entered herein on the 19th day of March, 1954, erroneously stated that the above named defendant had been found guilty of Arson and First Degree Murder, whereas it should have stated, Arson and Second Degree Murder.

"IT IS THIS 31st day of March, 1954,

"ORDERED, that the said judgment and commitment be, and the same is hereby amended by striking that portion of the said judgment and commitment which appears in the second paragraph and reads as follows:

[19] "Arson and First Degree Murder

and in its place and stead the following is hereby substituted:

"Arson and Second Degree Murder.

By the Court: CHARLES F. MCLAUGHLIN, *Judge.*"

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the District of Columbia Circuit by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears; [20] AND WHEREAS, in the term of October, in the year of our Lord one thousand nine hundred and fifty-four, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and the same is

hereby, remanded to the said District Court with directions to award a new trial.

January 20, 1955.

[21] YOU THEREFORE, ARE HEREBY COMMANDED that such further proceedings be had in said cause in conformity with the option and judgment of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

WITNESS the Honorable EARL WARREN, Chief Justice of the United States, the twenty-third day of February, in the year of our Lord one thousand nine hundred and fifty-five.

JOSEPH W. STEWART, *Clerk of the United States Court of Appeals for the District of Columbia Circuit.*

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[22] [File endorsement omitted]

In the United States District Court for the District of Columbia

[Title omitted]

MOTION TO DISMISS INDICTMENT—Filed April 8, 1955

Now come counsel for the defendant in the above-entitled cause and respectfully show unto the Court as follows:

First. That on the 6th day of July, 1953, a grand jury for the United States of America, impanelled in the District Court of the United States for the District of Columbia, holding a criminal term, returned and presented in said Court a bill of indictment, numbered 882-53, against the defendant, charging him with the offense of arson under D. C. Code, Title 22, § 401, and with the offense of felony-murder, which is murder in the first degree under D. C. Code, Title 22 § 2401.

Second. That this was a good and sufficient indictment.

Third. That on the 10th day of July, 1953, the defendant was arraigned and placed on trial in the said District Court of the United States for the District of Columbia, upon the charges of arson and of murder in the first degree as charged in said indictment #882-53.

[23] Fourth. That the said District Court of the United States for the District of Columbia had jurisdiction over this cause.

Fifth. That on the 10th day of February, 1954, the jury impanelled in said Court in said cause returned into Court a verdict in words as follows: "We, the jury, find the defendant Everett D. Green guilty of arson on count one. We find the defendant guilty of second degree murder on the second count." That said verdict was received in said cause and by the Court ordered filed and the jury discharged. On the 19th day of March, 1954, the Court then and there adjudged that the defendant was guilty of arson and of second degree murder and committed the defendant to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year to three years on Count 1; five to twenty years on Count 2, to run concurrently with the sentence imposed on Count 1.

Sixth. That the United States Court of Appeals for the District of Columbia Circuit on January 20, 1955, reversed the conviction of second degree murder and remanded this case for a new trial.

Seventh: That it now appears that the defendant will be retried on the greater offense of first degree felony murder.

[24] Wherefore the defendant, having been once in jeopardy for this offense, respectfully moves that the indictment be dismissed.

Dated: April 8, 1955.

GEORGE BLOW,
701 Union Trust Building
Washington, D. C.
CHARLES E. FORD,
116 Fifth Street, N. W.,
Washington, D. C.,
Attorneys for Defendant by
Court Appointment.

CERTIFICATE OF SERVICE—(Omitted in printing)

[25] [File endorsement omitted]

In United States District Court for the District of Columbia

Criminal No. 1083-53

Charge Arson; First Degree Murder

UNITED STATES

vs.

EVERETT D. GREEN, DEFENDANT

ORDER DENYING MOTION TO DISMISS—April 29, 1955

On this 29th day of April, 1955, came the attorney of the United States, the defendant in proper person and by his attorney, George Blow, Esquire, whereupon the defendant's motion to dismiss the indictment, coming on again to be heard, after argument by counsel, is by the Court denied. The defendant is remanded to the District of Columbia Jail.

By direction of

F. DICKINSON LETTS,
Presiding Judge, Criminal Court #2.

[1-2a] In the United States District Court for the District of Columbia

CRIMINAL ACTION NO. 1083-53

UNITED STATES OF AMERICA

v.

EVERETT D. GREEN, DEFENDANT

Transcript of Evidence

Washington, D. C., Monday, May 16, 1955.

Trial in the above-entitled cause was begun before the Honorable F. Dickinson Letts, a District Court Judge, and a jury at 10:00 o'clock a.m.

APPEARANCES:

Thomas Flannery, Esq., for the Government.
Charles E. Ford, Esq.,
George Blow, Esq., for the Defendant.

[3] COLLOQUY BETWEEN COURT AND COUNSEL

The COURT: Will counsel come to the bench, please.

(At the bench:)

The COURT: This case has been tried and is back from the Court of Appeals.

Mr. FORD: Yes.

The COURT: I thought I recognized it.

Mr. FORD: I may say, Your Honor, that the defendant noted the appeal. After the case had gone to the appellate court, the appellate court assigned Mr. Blow to argue the appeal, which he did. Then the case came back, and we are both appointed by the court in this case.

The COURT: Yes.

Well, now, what is the charge in the second count; is it now first degree?

Mr. FLANNERY: First degree, Your Honor.

It is a most unusual situation. The Court of Appeals reversed this second degree conviction, because they said that the evidence showed that he was guilty of first degree murder or nothing and that when the first trial judge instructed on second degree murder in the first trial, the defendant was prejudiced by that, because he was entitled to have his guilt determined on first degree only. So now it would appear that he has to be tried on first degree or nothing.

The COURT: They ruled out second degree?

[4] Mr. FLANNERY: Yes. They said the evidence in the first trial didn't show second degree.

The COURT: Is that the way you remember it?

Mr. FORD: Yes, Your Honor.

Mr. BLOW: Your Honor, I would like the record to show that we made a motion in this case to dismiss the indictment on the ground that——

The COURT: The record does show that.

Mr. BLOW: And we would like to reserve that question, of course, Your Honor.

The COURT: Of course, you have an exception to that.

Mr. FORD: Yes.

The COURT: So the record is clear on that. You presented your motion and it was denied. The record reveals that.

Mr. FORD: The Court may be faced with this, which we

consider a serious matter, if the defendant takes the stand in this trial now, whether or not the Government can ask him if he is the same person who was convicted of the arson in this case. You see, he was convicted of arson in this case on these facts at this place.

The COURT: Does that arson verdict stand or not?

Mr. BLOW: The arson verdict was not appealed.

Mr. FLANNERY: It was not appealed.

The COURT: So that stands. So the only trial here is on [5-9] the second count?

Mr. FLANNERY: Yes, sir.

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[10-18] VOIR DIRE EXAMINATION

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[19-45] The COURT: What do you say?

Prospective Juror WEBER: I will serve if I am chosen.

The COURT: Then there will be no reluctance on your part in finding him guilty, which will require the death penalty, if the facts and circumstances indicate that you should do so, when you understand the law?

Prospective Juror WEBER: Yes, sir.

The COURT: Very well, all right.

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[46] JOHN MALINAK was called as a witness for the Government, and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. FLANNERY:

Q. Will you please state your name?

A. John Malinak.

[47] Q. You are a member of the Fire Department, are you not?

A. Yes, sir.

Q. On May 26, 1953, were you employed by the Fire Department?

A. Yes, sir.

Q. What firehouse, what part of the Fire Department did you work?

A. I was with Truck 3.

Q. On that date, in the course of your duties, did you have occasion to respond to 1115 Massachusetts Avenue, Northwest?

A. Yes, sir.

Q. Is that in the District of Columbia?

A. Yes, sir.

Q. What time did you respond there?

A. It was approximately 20 minutes of 8:00 a. m.

Q. When you arrived on the scene, what did you see?

A. Well, when I arrived at the scene, the truck pulled up in front of the house and smoke was coming out from underneath the eaves near the roof, which indicated that the house was full of smoke.

Mr. FORD: Wait a minute. May that part, his opinion, go out?

The COURT: Yes, the latter part of the answer may go [48] out. Just relate facts.

By Mr. FLANNERY:

Q. You saw smoke coming out from under the eaves?

A. Yes.

Mr. FORD: But he left out the part also of the eaves of the roof.

By Mr. FLANNERY:

Q. What did you say?

A. I said eaves of the roof.

Q. What else did you see?

A. Well, engine companies were waiting to get a line into the house, and we worked with the engine company.

Q. Not what we did; what you did.

A. Well, that particular day I did work with the engine company, being assigned a certain tool which was used to force doors open if there isn't any other way of getting in.

Q. What did you do?

A. Well, I forced the front door open in the basement and went in with the hose line of Engine Company No. 16.

Q. Will you describe how you forced the door open?

A. Well, using this tool, what we call a claw tool, I butted the door in a number of times, forcing it open.

Q. Did you ascertain whether or not that door had been locked?

A. Yes, sir. I tried it first, before I started pounding on it.

[49] Q. And it had been locked?

A. Yes, sir.

Q. Then, after you forced the basement door, what did you do then?

A. Went in with the hose line, more or less feeling our way in, and working in towards the building, in towards the rear of it, I shopped, oh, at a fire up against the wall, oh, about 10 feet in from the door, and played water on that fire and put it out, and working again towards the rear of the building, stopped at another fire up against the same wall, oh, approximately another 15 or 20 feet. After putting that out is when I started ventilating; opening up windows and doors.

Q. Was there smoke in the basement when you first went in?

A. Yes, sir. I had to put on a mask to get in.

Q. You put on a mask?

A. Yes, sir.

Q. You say you started ventilating doors and windows. Will you describe what you did in that regard?

A. Well, the first door I run into is opposite that second fire in the rear of the floor, and that opened into a bathroom, and as I opened that door, I seen a man laying in the tub face down. I noticed there was a couple inches of water in the tub. I held my hand under his head and called for help [50] to help carry him out. And the squad responded to my call and we carried him out through the basement door in the front of the building and laid him out on the lawn.

Q. Who was that man?

A. That was Mr. Green, as I found out later.

The Court: Is he here today?

The Witness: Yes, sir.

By Mr. Flannery:

Q. Where is he today?

A. That is the defendant right in front of me (indicating).

Mr. FLANNERY: May the record indicate, Your Honor, that this witness identified the defendant?

The COURT: The record may so show.

By Mr. FLANNERY:

Q. Did you open any other doors or windows in the place?

A. As I recollect, I opened a window in the bathroom. It didn't seem to be locked. It more or less just slid up a little easy like.

Q. That was the window in the bathroom where you found this defendant?

A. Yes, sir.

Q. Did you do anything else in connection with this fire? Did you have occasion to go back in the basement at all? [51-53] A. Yes, sir, I was in that basement a number of times, and on one of those occasions in going out through that front basement door, I more or less smelled and heard a slight hiss, I believe, of escaping gas, and turning around, I noticed the plug taken out of the pipe leading into the gas meter, from which gas was escaping. Further noticing, I looked at the meter, and on top of the meter was this one plug; it seemed like it come out of that one opening in that pipe, and I replaced it.

Mr. FORD: Your Honor, may we object to the plug, seemed like it came out?

The COURT: Yes. That part of the answer stating that it seemed like something may go out. Just tell what you did and what you saw.

By Mr. FLANNERY: What did you do?

A. This plug laying on top of the meter—I just, well, more or less tried it on for size into this opening in the pipe, and it fitted right in, just screwed it back in.

Q. And it stopped the gas from escaping when you put it back on?

A. Yes, sir.

Mr. FLANNERY: I believe that is all of this witness.

CROSS-EXAMINATION:

By Mr. FORD:

[54] Q. I got you. So that as you jumped off the engine and got into the building, just before you went in through the door, you put the gas mask on?

A. Just before I entered the building.

Q. That is what I mean.

A. After it was broken in.

Q. Then you crashed in the door; is that right?

A. That is right.

Q. Then there came a time, as I understood you to say, when you went into the bathroom; right?

A. Yes, sir.

Q. Now the bathroom that you went into is on that same floor, the basement floor?

A. Yes, it was.

Q. And that is about how far back did you have to travel? Now assuming that you are coming in the front door, say, we are on the outside now (indicating), and you are ready to go into that building——

A. Yes, sir.

Q. —you crash through the door. Then how far back did you have to go before you got to a point where you could go in the bathroom?

A. I should say about 35 feet, 40.

Q. Then that would be to your right, would it, as you are coming in and facing the rear of the building?

[55] A. Well, the fires were on the right of the wall.

Q. Yes, but I am asking you where the entrance is to the bathroom.

A. That was on my left, opposite that second fire.

Q. To your left?

A. Yes, sir.

Q. Was the bathroom door open or did you have to force that open? Did you have a problem there?

A. No, sir. It was closed, but it was not locked. It was open.

Q. So it was closed, then. All you had to do was push on it and it opened?

A. That is right.

Q. And you didn't have to do any either a knocking or a crashing it down, but just manually, with your hands, you pushed the door open?

A. Turned the knob and opened it.

Q. Turned the knob and opened it?

A. That is right.

Q. Now at this time, when you went into the bathroom, were you by yourself or was there one of your comrade firemen with you?

A. No, I was by myself.

Q. And there you saw a bathtub, right?

A. Yes, sir.

[56] Q. As I understood you to say, you saw Mr. Green in the bathtub laying face down?

A. That is right, sir.

Q. Correct?

A. Yes, sir.

Q. And that you saw some water in the bathtub?

A. I did, sir.

Q. About how much water, would you say? I don't mean the gallonage; I mean by inches or feet.

A. I should say two or three inches at the most.

Q. And then what did you do when you saw the condition?

A. As I seen him laying on his stomach, more or less, I just put my hand underneath his head and kept it up above the water and yelled for help.

Q. Then, as you yelled for help, a fireman came to help you?

A. The squad came in, yes, sir. They responded on the scene.

Q. Is that what we know as the rescue squad?

A. The rescue squad, yes, sir.

Q. And that would be composed of several firemen?

A. Yes, sir.

Q. As they responded to your call, what did they do?

A. They all carried him out. I don't know just how many of us were there present.

[57] Q. There was more than one; correct?

A. Yes, sir; carried him out the front door of the basement.

Q. Did you see some blood on him?

A. Well, as I turned him over to carry him out the door, I noticed the front of his shirt was covered with blood.

Q. I wonder if you could give us a little more detail as to what you mean when you say covered with blood?

A. It was more or less like somebody would be laying in a pool of blood, and it was just covered with blood, is the only way I can describe it.

Q. So that there was a whole lot of blood; right?

A. Well, I should think there was.

Q. I mean, that is a fair statement of what you saw; right?

A. Yes, sir.

Q. Then did you see blood in the water?

A. That I did. The water seemed like it was diluted with blood.

Q. And would you say there was quite a bit of blood in the water?

A. As far as I can recollect, it didn't seem like there was too much, but you could see it was diluted with blood.

Q. Would you say there was a good amount of blood in the water?

[58-60] A. I just don't know how much a good amount would be.

Q. Well, I don't think you measured it, but I do want to get an idea, like if it would be a little bit of blood, like if I pricked my finger and a little blood would come out or if I took a knife and cut myself deep, then maybe a lot of blood would come out my shirt. That is what I am trying to show.

A. I don't believe there was too much. It was more or less on the thin side of being diluted with blood and water.

Q. However, I think you said that the shirt was full of blood?

A. Well, it was bloody, but that wouldn't be actually blood. It would be diluted with water. It was red.

Q. Put it this way: Describe it by its color. Was the shirt full of red color?

A. Yes, it was.

Q. There was a window in that bathroom, too, wasn't there?

A. Yes, sir.

Q. Was that window open or closed when you went in?

A. As far as I can recollect, it was closed and I opened it, but it went up real easy. It didn't seem like it was locked.

Q. And you found Mr. Green unconscious, didn't you?

A. Actually, I didn't know whether he was conscious or unconscious.

. . . . . .

[61] Q. Now let me ask you this. When you were on the stand down there, were asked that question either by the coroner—yes, by the coroner—were you asked this question: "Was he conscious?"

A. I was.

Q. Right?

A. Yes, sir.

Q. And that question was asked you down there; right?

A. Yes, sir.

Q. And then you answered: "No, he was unconscious as far as I knew. At least he seemed like he was. I yelled for help and I really don't know who I got to help me, but three or four of us went out the same way and carried him out through the same way we came in, through the door in the basement. I noticed he had a cut on the back of his neck. He was laying on his stomach in the tub and as we lifted him up, his undershirt was bloody right over his stomach."

[62-63] Now I have read the full answer you gave, have I not?

A. Yes.

Q. And I haven't put anything in it or taken anything out; right?

A. Yes, sir.

Q. So now that is the way you testified down at the morgue; right?

A. Yes, sir.

Q. So now I want to ask you, isn't it your recollection that he was unconscious?

A. Well, there was no way of telling if he was unconscious or not. Here I don't state that he was. It seemed like he was unconscious.

Q. Did you state there he wasn't unconscious?

A. I did say no, he was unconscious as far as I knew.

Q. Right. Now that is the end of the sentence; right; there is a period there?

A. That is right, sir.

Q. What would you say now, that as far as you know, he was unconscious?

A. That is right.

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[64] Q. Where else did you see blood, if any, in addition to there being blood over his stomach, blood over the upper part of his body and blood on his neck? Where, in addition, did you see blood on the defendant?

A. That is all, sir.

Q. Those three places?

A. Yes, sir.

Q. Then you and the members of the rescue squad carried him out through the basement door——

A. Yes.

Q. —to the outside; right?

A. Yes.

[65-69] Q. When you got on the outside carrying him, what did you do?

A. We laid him on the lawn, and that is the last I seen of him that day.

Q. So you laid him on the lawn and you left to take care of something else to do with the fire?

A. Yes.

Q. And that was the last time you had seen the defendant; is that right?

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[70] Dr. RICHARD ROSENBERG, was called as a witness by the Government, and after being duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION:

By Mr. FLANNERY:

Q. Doctor, please state your name.

A. Richard M. Rosenberg.

Q. You are a deputy coroner, are you not, sir, at the District of Columbia Morgue?

A. Yes, sir, I am.

Q. On May 26, 1953, were you also a deputy coroner at the District of Columbia Morgue?

A. Yes.

* * * * *

[71] Q. Doctor, on May 16, 1953, did you have occasion to perform an autopsy on one Betty Brown?

A. I did.

Q. At what time did you perform the autopsy?

A. 1:00 P. M.

Q. Will you please relate what the autopsy revealed?

A. The autopsy revealed that the lungs were markedly congested and markedly edematous. By edema is meant a collection of fluid. The trachea and bronchi—trachea is a tube that leads from the mouth into the chest cavity, approximating the lungs; it branches off to form the bronchial tubes on either side—were markedly inflammed throughout.

Q. What did that indicate to you, the fact that the trachea and the bronchi were markedly inflammed throughout?

A. The tissues had been subjected to irritation.

Q. All right, go ahead.

A. She also was an aged woman, 83 years of age. Her [72-89] heart was normal in size but was markedly degenerated; by that is meant that it was diseased, and there was positive fat in the covering of the heart. The large vessel going off the top of the heart was dilated and inflammed and the coronary arteries, which are vessels that supply the heart itself, were hardened.

Q. All right, what else did you find?

A. There was a generalized arteriosclerosis, which means that all her blood vessels were sclerosed or hardened. There was some congestion or edema in the brain. The remaining organs showed degenerative changes, compatible with her age but not remarkable.

Q. Did you determine what the cause of death was in this case?

A. Yes. The cause of death was pulmonary edema and an acute tracheobronchitis and anoxia, which means lack of oxygen due to the inhalation of hot irritating gases. As concomitant or accompanying causes, I have chronic arteriosclerotic heart disease.

Q. In your opinion, was the deceased in this case alive at the time she inhaled the hot gases that you speak of?

A. Yes.

Q. In your opinion, did she die as a result of inhaling the hot gases that you have spoken of?

A. Yes.

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[90] JAMES H. SHIMP, was recalled as a witness by the Government, and having previously been duly sworn, was examined and testified further as follows:

DIRECT-EXAMINATION (resumed).

(The reporter read the last two questions propounded to this witness and the answers thereto.)

By Mr. FLANNERY:

[91] Q. Unless you need to refer to that to refresh your recollection, you don't have to use them, but I will ask you this. What were the results of your chemical analysis; what did you find?

A. I found that the blood was 14 percent saturated with carbon monoxide.

Q. 14 percent saturated with carbon monoxide?

A. That is right.

[92] CROSS EXAMINATION.

By Mr. BLOW:

Q. Mr. Shimp, when you examined this blood, that was one day old, was it not?

A. Yes, sir.

Q. Mr. Shimp, are you familiar with a book by Dr. Louis Goodman and Dr. Alfred Gilman, of Yale University, entitled The Pharmacological Basis of Therapeutics?

A. No, I am not.

Q. Those gentlemen are professors of medicine at Yale University. At Page 696 of this book, they describe the symptoms of carbon monoxide poisoning. You have stated, I believe, that you found or that a result of your analysis indicated that the blood was 14 percent saturated with carbon monoxide.

A. That is true.

Q. If I may read from this text——

Mr. FLANNERY: I would object to counsel reading from a text.

Mr. BLOW: May I give the witness this book and ask him to read from the text, Your Honor?

The COURT: He said he doesn't know anything about it.

Mr. BLOW: May I ask him to take a look at the book, Your Honor?

[93] Mr. FLANNERY: I object to it.

The COURT: For what purpose?

Mr. BLOW: The purpose, Your Honor, is to show that 14 percent carbon monoxide in blood is of absolutely no consequence at all, that unless there is 70 or 80 percent——

The COURT: You can ask him for his opinion, but you can't introduce the opinion of others by asking him.

Mr. BLOW: Yes, Your Honor.

By Mr. BLOW:

Q. In your opinion, Mr. Shimp, would 14 percent carbon monoxide in the blood have any serious effects?

A. I am not qualified to speak on that. That is for a doctor to say.

Q. Have you ever examined anyone who had 70 to 80 percent carbon monoxide saturdation?

A. Yes, I have.

Q. Would finding 70 or 80 percent carbon monoxide lead you to conclude that they had died from carbon monoxide poisoning?

A. That is up to the morgue doctor, the doctor in charge of the case that made that conclusion.

Q. But 14 percent is a very low percentage as compared to the percentages that you have found in persons whose blood you have examined?

A. That is true.

[94] Dr. RICHARD ROSENBERG, was recalled as a witness by the Government, and having previously been duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION.

By Mr. FLANNERY:

Q. Doctor, are you familiar with the results of the chemical analysis of the blood of Betty Brown in this case?

A. Yes.

Q. Are you familiar with the fact that the chemist found 14 percent of carbon monoxide in the blood?

A. Yes, sir.

Q. Does that indicate anything to you in this case, Doctor?

A. She had to be alive in order to inhale it, and it would be a factor in her death, because carbon monoxide is a [95] lethal gas in some instances, even in small amounts.

[96] CROSS EXAMINATION.

By Mr. BLOW:

[97] Q. I ask you what the customary symptoms are when a person has from zero to 10 percent saturation?

A. Ordinarily, they are very mild and may be absent.

[98] Q. May I ask you what the symptoms would be with those where that saturation is 10 to 20 percent?

A. They may be absent and still mild.

Q. May I ask you what they would be with a saturation of 20 to 30 percent?

A. Ordinarily, the individual becomes conscious something is amiss, indicated by headache, nausea, sometimes vomiting, weakness, muscular weakness, particularly in the legs. However, these symptoms may not be present; there may be none whatever.

Q. May I ask you what symptoms would be evident from 30 to 40 percent saturation?

A. I am afraid I will have to stop on that. I am not sure.

Q. What would the symptoms be, say, from 70 to 80 percent carbon monoxide saturation?

A. That is the maximum amount that has ever been found, and the symptoms would be very marked, unconsciousness, heart and blood pressure failure and death.

Q. That is, between 70 and 80 percent carbon monoxide saturation?

A. That is right.

Q. Doctor, I believe you have had occasion to do many autopsies in the last 20 years?

A. Yes, sir.

[99] Q. And during an autopsy, it is my understanding that you examine all of the organs of the body to see whether or not they are healthy or diseased?

A. That is right.

Q. Did you make such an examination of all the organs of the body of Miss Betty Brown?

A. All except the brain—no, I take that back—yes, all.

Q. With regard to the brain, what sort of an examination, may I ask?

A. Sections and examined—section, that means cut and examine.

Q. When was this done, Doctor?

A. The day the autopsy was done.

Q. Correct me if I am wrong, but it is my understanding that there may on occasion be a hardening of the arteries in the brain, there may be arteriosclerosis in the brain?

A. That is right.

Q. That there may be a rupture there?

A. Yes.

Q. And that in that event, it is impossible to determine that question until, oh, one or two months after death; is that correct or not?

A. No, I am afraid not. If there is a rupture of a vessel in the head or the brain, that would entail hemorrhage, [100] and that would be readily visible to the examiner.

Q. However, there is a test whereby the brain is preserved after death for some time in order to be perfectly sure there was no such rupture even in small parts of the brain?

A. I don't know the situation where there would be a rupture in a vessel of a living person without the evidence being readily available to the examiner.

Q. What condition did you find in Miss Brown's brain?

A. It was congested and edematous. By congested is meant that all the vessels, the myriad of vessels that form the network over and about the brain, were gorged; that is the congestion. There were also tiny hemorrhages through the brain substance called pinpoints or punctate, both of which are indicative of marked congestion. The

other was the presence of fluid, an abnormal amount of fluid, which is described by the word edema.

Q. Would it be possible for a person whose brain was in that condition to have a stroke, what we know of as a stroke?

A. What is known as a stroke is the rupture of a blood vessel in the brain.

Q. Would that be a likely occurrence in a person 83 years old with a brain condition as you have described?

A. It could have happened; I mean, she could have had a stroke at sometime had she lived.

[fol. 101] Q. What other organs of the body did you examine? Did you examine the liver?

A. The lungs, heart, liver, spleen, pancreas, stomach, intestines and kidneys.

Q. Exactly what, may I ask, did you find when you examined the kidneys?

A. They were congested and fibrotic. The word fibrotic means that the normal tissue that comprised the kidneys had been supplanted by a baser type of tissue fibrous in nature. In other words, normally, in a normal kidney, the resilience is of a certain degree which one learns from experience, and a kidney that is fibrotic is much tougher, harder, and you can tell it and feel it when you cut it and certainly when it is examined microscopically.

Q. Doctor, would you call a kidney in that condition diseased?

A. Yes, in any deviation from the normal.

Q. Would you say that condition was a chronic condition——

A. Yes.

Q. —or an acute condition?

A. No, no, chronic.

Q. Could it in a person 83 years of age sometime result in death?

A. I am afraid I don't understand your question, sir.

[102] Q. May I rephrase it: Were this condition to be undiagnosed and unattended in a woman of these years, would it be possible for that condition to be the cause of her death, leaving out any question of a fire?

A. As I understand it, the question is, had this woman gone on to live, would there come a time or could there

have come a time when this kidney would have been sufficiently bad to generate conditions in her to bring on her death, to cause her death; is that it?

Q. Yes, sir.

A. The answer is yes.

Q. Doctor, did you find anything wrong with her liver?

A. All her organs were about the same. They were all degenerated, fibrotic, and the vessels were hardened.

Q. And you would call the liver diseased as well as the kidneys?

A. Yes. The liver was swollen, congested and fibrotic, and the same condition existed there as existed in the kidneys, congested and fibrotic.

Q. Doctor, isn't it a fact that a very serious heart condition and a diseased kidney, a diseased condition in the kidneys, are often found together?

A. Yes.

Q. That they often appear at the same time in a person of that age

[103] A. Yes, very frequently.

Q. Doctor, when you examined the heart, would you mind repeating what you found as to the heart condition?

A. The heart was normal in size but markedly degenerated, and there was a large deposit of fat in the epicardium. The heart was normal in size, which is a little unusual, because most of the time in aged people there is a tendency toward some enlargement of the heart. However, that wasn't true. However, it was markedly degenerated, and by that is meant again the fibrous tissue had invaded the heart and supplanted normal muscle tissue, and in addition to that the coronaries, which are a system of blood vessels that encircle the heart at the top—somebody thought it resembled a crown; that is why it is called the coronary crown—and from the top the vessels go down, somewhat like fingers, to supply the heart muscle. Now that system of vessels were hardened or sclerosed.

Q. You would also describe that condition, then, as a condition of a diseased heart?

A. Yes, sir, markedly diseased.

Q. Markedly diseased?

A. Yes, sir.

Q. And you would say that these things that had been happening to her heart were in a fairly advanced stage?

A. That is right.

[104] Q. When you examined her?

A. That is right.

Q. Doctor, please correct me if I am wrong, but I understood you to say that the cause of death, the chief cause of death, was pulmonary edema?

A. That is right.

Q. That a contributing cause of death was the chronic heart disease?

A. I said pulmonary edema, which is the formation of fluid, and an acute tracheobronchitis—anoxia, which is oxygen deprivation due to the inhalation of hot irritating gases. A contributing factor was this chronic arteriosclerotic heart disease.

Q. Nevertheless, if I may refresh your memory, I believe at the coroner's inquest—and you there testified, did you not, Doctor?

A. I don't recall.

Q. —you said that the primary cause of death was this lung condition.

A. That is right.

Q. That would be the pulmonary edema, would it not?

A. Oh, no; the three, at least the pulmonary edema and the trachea and bronchi are part of the lungs, too.

Q. But mere inflammation of the trachea and bronchi would not cause death by itself?

[105] A. Oh, yes, it would; yes, it would.

Q. Nevertheless, you would describe and you have said that by lung condition, you meant the pulmonary edema.

A. The primary factor was the irritation of the trachea and bronchi, and they were the ones that set up the pulmonary edema.

Q. Doctor, may I ask you this question: Is not one of the many, many causes of pulmonary edema a so-called, left-side heart attack? I don't know the formal medical term. Is not one other——

A. Heart failure, yes.

Q. Heart failure?

A. Yes.

Q. Heart failure is a cause of pulmonary——

A. Yes, sir.

Q. Is not pulmonary edema often found in people who have hypertension?

A. Not because of the hypertension itself, but the hypertension eventually causes heart failure, and that in turn will cause edema in many places, such as swollen ankles and fluid accumulation in the lungs.

Q. Could not pulmonary edema follow severe shock?

A. Of course, the answer is yes, if I may qualify it.

Q. Yes.

A. It would depend on the degree of shock and how long [106] it lasted. Any shock that would persist for some time, particularly in an individual who may have some heart condition, would very likely produce pulmonary edema.

Q. What I am getting to, Doctor, is that the condition known as pulmonary edema is very oftentimes in persons with heart disease of some or many kinds and whose hearts stop, in other words, who have a heart failure.

A. Yes, pulmonary edema is a very frequent accompaniment of heart failure, as a matter of fact, most of the time.

Mr. Blow: That is all I have.

Redirect Examination.

By Mr. Flannery:

Q. Doctor, the pulmonary edema in this case, the case of Betty Brown, was caused by what, in your opinion?

A. Tracheobronchitis.

Q. Which was caused by what, in your opinion?

A. Inhalation of hot gases.

Q. In this particular case, talking about the case of Betty Brown, did she die from kidney trouble?

A. No, sir.

Q. Did she die from liver trouble?

A. No, sir.

Q. Did she die because of her markedly diseased heart?

A. That was a contributing factor. Had this woman been younger and all her organs in good shape and *had* she been [107-184] subjected to this thing, there is a possibility she may have survived. It is not a likely one, but it is within the realm of possibility, it could have happened. However,

what happened to her, the inflammation of her lung tissue, on top of the fact that she had a badly diseased heart, and her age, was enough to bring about her death.

Q. A younger person might have survived this fire?

A. That is a possibility.

Mr. FLANNERY: All right, that is all.

The COURT: Do you have anything further, Mr. Blow?

Mr. BLOW: I would just like to ask Dr. Rosenberg if he in his examination found any burns on the body.

The WITNESS: No, sir.

RECROSS EXAMINATION.

By Mr. BLOW:

Q. Did you examine her clothing?

A. All she had on was a nightgown and an undershirt, and I made a note, there was no evidence of fire damage to the clothing or body.

Mr. BLOW: Thank you, Doctor.

Mr. FLANNERY: That is all I have.

* * * * *

[185-190] WARREN C. KELLY, was called as a witness for the Government, and after having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION.

By Mr. FLANNERY:

Q. Will you state your name, please?

A. Warren C. Kelly.

Q. You are a member of the Fire Department, are you not, sir?

A. Yes, sir.

Q. What is your position with the Fire Department?

A. I am a fire inspector assigned to the fire investigations section of the Fire Marshal's office.

Q. On May 26, 1953, were you so assigned in the Fire Department?

A. Yes, sir, I was.

Q. What is the nature of your duties?

A. To investigate fires to determine the origin and extent of the fires, the cause of the fires and the damage to the property done by fires.

* * * * *

[191] Q. Now, Inspector Kelly, directing your attention to May 26, 1953, you were a member of the Fire Department on that date, were you not?

A. Yes, sir.

Q. And detailed to the same type of work that you have testified that you are now engaged in?

A. Yes, sir.

Q. Now on that date, May 26, 1953, did you have occasion to go to premises 1115 Massachusetts Avenue, Northwest?

A. Yes, sir, I did.

Q. What time did you arrive there?

A. Between 7:45 and 8:00 a. m.

Q. When you arrived at 1115 Massachusetts Avenue, Northwest, what did you do?

A. I went into the building.

The COURT: What was the date, please?

The WITNESS: It was May 26, 1953.

I went into the building. As I went through the front yard to the building, I saw an elderly lady lying on a stretcher and two firemen had the resuscitator on her. I continued on into the building through the front door. This is a three-story brownstone front building with a basement. As I went in the front door, the second room to my left as I went down the hallway, there was evidence of two fires having occurred, two separate fires.

[192] Q. Two separate fires?

A. One along the east partition of that room and one along the north partition of the room, which is across the room from that point.

There was also evidence of another fire having occurred, a third separate fire, underneath the stairway of this hallway opposite the room which I just had reference to. Then I continued on throughout the building, and when I went into the basement, I saw evidence of another fire having occurred at the foot of the rear basement steps, the rear of the building, about six feet after you get to the bottom of the basement steps, along the east wall.

And in the front room of this basement, which is—the building is approximately 50 feet deep—in the front room of this basement, there was evidence of another fire having occurred along the east wall, about 15 to 20 feet inside the front basement door. On the first floor up there I detected an odor of what appeared to be a turpentine odor and examined it. To a degree it had an odor of turpentine about it.

Q. Which fires were they?

A. That is on the first floor, the two fires in the center room on the first floor. I went on back into the kitchen there and saw a quart turpentine bottle. It was empty except for a little dampness in the bottom of it. I unscrewed the cap, and it did have the odor of turpentine in it. I saw [193] while I was in the kitchen also a box of stationery sitting on the table; it is a white enameled top table, with a pencil and a pair of reading glasses beside it, and on lifting this, underneath this stationery box, it was white and clean, and all around it throughout the other surface of the table was discolored from the heat and smoke.

Q. As an expert on fires, the origin of fires, did the fact that the surface underneath the letter box was clear indicate anything to you?

A. Yes, that the box was in place there where it was previous to the fire and the smoke and the heat and the outline of the box, of course, sitting on the table, protected that portion of the table from the discoloration of the heat and smoke.

Q. Getting back to these fires for a minute, you said you saw evidence of fires. Will you describe what evidence you saw of fires?

A. Along the north partition of the second room, inside the front door, was a fire that had occurred down low on the floor. It had burned the basement and the floor, it had burned a hole through the floor. There was deep charring throughout the immediate area. There was miscellaneous scrap lumber and some trash and other things that had been on fire. The cracks were burned out very deep in an irregular pattern around there, which indicated to me that it had been an inflammable liquid involved.

[194] Q. Why do you say that? Will you explain that a little bit?

A. The deep burning of the cracks—any liquid that is

poured or spilled on the floor will seep down into cracks, and that liquid in the cracks will burn down in deep as well as on the surface, and you will have a distinct burning in the cracks of the wood, whereas any bulk material lying on the floor will burn in a regular pattern the same depth as to where the material is and it wouldn't burn down into the cracks like the inflammable liquid, which would be spilled and then the cracks would burn. Also, you have a distinctive checkered, what we term as an alligator effect in the wood, which more or less raises and cracks the wood into squares.

Q. What is this alligator effect, what causes that, in your opinion?

A. It is the intense heat in that area; it is not consuming the wood itself, but it is the intense heat that causes it to raise and more or less disintegrate and looks something like charcoal rather than burnt ashes.

Q. That would be caused by what, in your opinion?

A. The inflammable liquids.

Q. All right, then, go ahead now. What else, if anything, did you notice about these fires?

A. Of course, on the east wall was this other fire that had [195] occurred aolng the partition; it started down low in the floor. There was a door frame there that hadn't been put in place. The partition hadn't been completed; it was in the process of being installed. There was some tar paper running up and down the partition; where the metal lathe had been burned, it had been turned. The 2 by 4 studdings had been burned and had gone up to the ceiling.

In the hallway outside of this room, underneath the stairway, there were two stepladders stored, and back in the corner by the radiator, between the radiator and the corner, was some trash and a few scrap boards that had burned and had caught the bottom base of the ladders. In the basement, the one in the rear, at the foot of the basement steps, was scrap lumber, wooden screen frames, a wooden door and scrap lumber, as I say, had been involved in the fire.

Of course, they have a concrete floor there and a brick wall, and it didn't catch the floor or the wall. In the front of the basement, about 15 feet inside the front basement entrance, there was another fire, which would be about 20 to 30 feet from the other fire in the rear.

Q. Any connection between the two?

A. No, no connection between the two.

There was a box spring frame, lawn mower, a coil of rubber hose, garden hose and double pieces of scrap lumber that had been on fire. Of course, there was still smoke and [196] heat in the building when I went in. The fires had been extinguished when I got in there. There was water over the floor and so forth.

Q. Now in your opinion as an expert, did these fires result from natural causes or were they self-started?

A. No, sir; in my opinion, they were caused by some person. We had evidence of the five separate and distinct fires; no connection between the two; no communication between any of the two or any of the five. The materials, the type of materials that were on fire was not the type that would cause any spontaneous ignition or there was no electrical wiring involved in any way in any of the fires. There was just no cause for the fires to be found other than intentionally set.

Q. Did you consider the odor of turpentine in reaching your opinion?

A. Yes, sir, the odor of the turpentine on the floor also.

Q. Do you have any opinion as to which fires, the fires on the first floor or the fires in the basement, were started first?

A. I believe the fires on the first floor were started first due to the fact that the fire had burned completely through the floor in a couple spots and the extent of the fire, and then the type of material that was on fire in the basement, of course, would burn more readily than the floor itself would [197-198] upstairs.

Q. Did you ascertain which room in that house was the room occupied by Betty Brown, the deceased in this case?

A. The front room immediately to the left as you enter the front door.

Q. And those three fires on the first floor that you have described were where in relation to Betty Brown's room?

A. They were in a room directly in the rear of her room, which would be the center room or the second room from the left as you enter the front door.

Q. Now you have related that you found a bottle which had the odor of turpentine in it, you say?

A. Yes, sir, in the kitchen.

Q. Did you take that bottle into your possession and mark it in any way?

A. Yes, sir, I did.

Mr. FLANNERY: Mark this the next exhibit number.

* * * * *

[199] Q. Now I will ask you this. Did there come a time when you had occasion to talk to the defendant in this case, Mr. Green?

A. Yes, sir. On the same day, May 26, about 3:00 p.m., I went with Fire Marshal Roberts to D. C. General Hospital, which was then known as Gallinger Hospital, and I talked with Mr. Green in the strong room there at the D. C. General Hospital.

Mr. Ford: May we approach the bench now, Your Honor?
THE COURT: Yes.

(At the bench:)

Mr. FORD: We want to give the Government notice that we challenge the admissibility of this conversation, and the first notice I have now is that he testified that he talked to him in the strong room at the hospital. So with that statement, we are going to challenge any conversation he had with the man, because he says he was confined in the D. C. General Hospital in the strong room. In the absence of a showing of anything else, we think that is enough for us to raise the challenge.

MR. FLANNERY: Would Your Honor suggest a hearing out of the presence of the jury or shall I ask the usual [200] questions as to whether there was any force or duress used?

THE COURT: Well, we'll be as sure as we can about it. I think we will hear the testimony. How long is that going to take now?

MR. FORD: We don't think under the late decisions that you are limited to force and duress, because we have a late decision about brainwashing. You don't even have to go near the person to touch him. Yes, it has been in the Federal courts, since Russia has shown that that is a greater torture than others.

MR. FLANNERY: It shouldn't take long, Your Honor, maybe 15 or 20 minutes, if that long.

THE COURT: All right, I will ask them to step out.

(In open court:)

THE COURT: I will ask the jury to keep in mind the admonition and step out of the courtroom until I call you back. Absent yourselves from the room, but don't get too far away, please.

(Whereupon, the jurors left the courtroom, and the following proceedings were had in the absence of the jury:)

THE MARSHAL: They are all out, Your Honor.

EXAMINATION ON VOIR DIRE

By Mr. FLANNERY:

Now, Inspector Kelly, you have testified, I believe, that on May 26, around 3:00 p.m., you went to what was then known as Gallinger Hospital, what is now D. C. General [201] Hospital, and had occasion to talk to the defendant, Everett Green.

A. Yes, sir, that is right.

Q. Now you said that was in the strong room at Gallinger Hospital?

A. That is what I was told. I asked where he was and they said he is in the strong room. It was some room upstairs where they had a policeman—I talked to a policeman and asked him if I could go in and speak with Mr. Green, and he asked Mr. Green, and Mr. Green said okay.

Q. When you went in to talk to Mr. Green, where was he?

A. He was in bed, in a ward with about 12 other persons.

Q. 12 other people in the ward?

A. Yes, sir.

Q. Did you question him?

A. Yes, sir, I did.

Q. Before questioning him, did you make any promises to him in return for what he might say to you?

A. No, sir.

Q. Did you threaten him?

A. No, sir.

Q. Did you use any duress on him?

A. No, sir.

Q. Did you physically assault him?

A. No, sir.

Q. The questions that you asked, did he answer freely [202] and voluntarily as far as you know?

A. Yes, sir, he did.

Mr. Flannery: Your witness.

By Mr. Ford:

Q. Now, Lieutenant, how did you know he was at Gallinger?

A. I am not positive how that information came to me.

Q. Tell us, even if you're not positive, what it was, the information.

A. I know I inquired from someone as to where he was; whether it was from the Homicide Squad or whether it was at Emergency Hospital, I am not positive, but I learned that he was at the D. C. General Hospital.

Q. What time of the day was it you say you went to the hospital, to Gallinger?

A. About 3:00 o'clock p.m.

Q. Isn't it a fact that you called Emergency Hospital and you asked if he was there?

Oh, by the way, you knew that he had been carried to Emergency Hospital, did you not?

A. That is what I heard, yes, sir.

Q. You also heard, did you not, that he had been carried there from Massachusetts Avenue in an unconscious condition?

A. No, sir, I didn't know how he was carried.

[203] Q. You have told us that when you came to the fire, there was a lady out on a stretcher. Did you see a man lying there on a stretcher, to wit, Mr. Green, who had been carried there by the firemen from the bathtub where they had found him face down? You had no knowledge of that?

A. I didn't see Mr. Green there, no, sir.

Q. And you had no knowledge of it?

A. I heard that a man had been taken to Emergency Hospital. I didn't know what condition he was in.

Q. And did you know that the man you had heard had been taken from there unconscious was the man you were going to talk to—we wouldn't just use his name, but that he was the man you wanted to talk to?

A. I wanted to talk to anyone I could that was in the house at the time these events took place.

Q. So that when you went out to Gallinger Hospital, you knew you were wanting to go out there to talk to a certain male, a man; correct?

A. Yes, sir.

Q. And you knew when you went out there that that man you wanted to talk to was the man who had been carried out of that house where there was the fire?

A. Yes, sir.

* * * * * * *

[204] Q. Did you know that he had been carried to Emergency Hospital?

A. That is what I was told, yes, sir.

Q. And isn't it a fact that when you called there, they told you at Emergency that he had just been transferred from Emergency to Gallinger?

A. I am not positive how that information came to me. I could have called Emergency, or I could have gotten it [205] from the Homicide Squad. I did learn that he had been transferred to Gallinger Hospital.

Q. Yes, but I am particularly directing your attention to not that he had been transferred alone, but that he had been transferred at a certain time of the day, trying to associate it with the time you went to Gallinger.

A. No, sir, I don't know. I don't recall whether I was told what time he was transferred or not. At the time I received my information was that he was now in Gallinger Hospital.

Q. Have you ever looked at any of the records of Emergency Hospital to see what their record shows as to the time he was transferred?

A. No, sir.

Q. Now you say you went into the hospital and you say the fire marshal was with you, Mr. Roberts, who had been a witness here?

A. Yes, sir.

Q. And when you walked in, where was it and who did you talk to?

A. I talked to a metropolitan policeman in a small office off a corridor on either the second or third floor, I believe.

Q. Now at that time, did you know that members of the Homicide Squad had already talked to him?

[206] A. Yes, sir, I was told that they had talked with him.

Q. Who was it that told you that; who were you talking to?

A. Sergeant Couture.

Q. And where was it you had the conversation with Couture?

A. At 1115 Massachusetts Avenue.

Q. And what time of the day was it that you had the conversation in which Couture told you he had talked to the man?

A. I believe it was approximately 10:00, 10:30 in the morning.

Q. When Couture told you he had talked to the man, did Couture recite to you what he, Couture, had asked the man and what the man had answered?

A. No sir, not in detail.

Q. Well, when you say no, sir, not in detail, what did he tell you, be it in detail or in generality?

[207] A. It was along the lines that he had been to Emergency Hospital, he had talked to Mr. Green and that—well, I don't remember what he said that Mr. Green told him.

Q. Have you given us all of the conversation between you and Couture regarding Couture's talking to Mr. Green?

A. There was some mention of an undershirt that had blood on it, and I believe that Couture had that in his possession at the time that he was talking with me. I know he did mention the fact that he couldn't find any holes in the undershirt and it did have some blood on it, and I believe that was about the extent of what he said that he had found out from Mr. Green.

Q. Didn't he talk to you about a pick?

A. Yes, there was an ice pick found on the premises when I was——

Q. That isn't what I asked you. My question is not what was found on the premises. My question is, did you talk to Couture and did you talk to Couture about a pick?

A. Yes, at 1115 Massachusetts Avenue, Northwest.

[208] Q. For the purposes of my question, I want to limit your conversation with Couture, no matter who was there, so long as Couture was having a conversation with you. What else did Couture tell you at this time at Massachusetts Avenue?

A. I don't recall any more definite conversation. It was a general conversation, I know, but I don't remember it in the exact words or his statements or my replies, I don't remember.

Q. Well, let me see if I can refresh your recollection. Did Couture, the member of the Homicide Squad, say to you, Look, I can't get anything out of Green, so maybe you try, you go see him? Did he say anything like that? You're a fireman, I'm a policeman?

A. No, sir, I don't recall any such conversation.

[209] Q. There was nothing like that which occurred, was there?

A. No, sir.

Q. Now, what did you go to see Green for?

A. For my own job that I had to do; I had to establish the cause of the fire. I wanted to find out who had caused the fire, and he was the only person that I knew of that would have any direct knowledge of the fires. I wanted to talk to him along those lines.

Q. Along the line of who caused the fire?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now when you talked to Couture what did Couture tell you what Green had said about who caused the fire?

A. I don't recall any definite statements as to that. I know that he hadn't found out who had caused the fires, I know that.

Q. Who, Couture had not?

A. Couture had not, yes, sir.

Q. So that at that time you knew that Couture had not found out, the time he was talking to you, who caused the fire?

A. Yes, sir.

Q. Did Couture so tell you that?

A. Yes, sir.

[210] Q. And that conversation that you had with Couture took place after Couture had talked to the defendant; is that right?

A. Yes, sir, that is right.

Q. Now after you got to the hospital, I understood you

[211] to say you went upstairs and you say you asked the policeman?

A. Yes, sir, there was a policeman in an office there on the corridor and I asked the nurse if I might see him.

Q. Which one did you talk to first, the policeman or the nurse, asking for permission to talk to Green?

A. I talked to the policeman first.

Q. What did you say to him?

A. I asked him if Mr. Green was there and if it would be all right to go in and talk to him.

Q. What did the policeman say; did he give you authority to go in?

A. He said it was okay with him, to ask the nurse.

Q. Then you went to a nurse; right?

A. Yes, sir.

Q. What did you say to her?

A. I asked her if it would be all right if I would talk to him, if he was in the condition that I might be able to talk to him.

Q. You asked if he was in a condition. What did she say about his condition when you asked if his condition was such that you could talk to him? What did she say his condition was?

A. She said it's all right to go in and talk to him.

Q. So that when she said to you it's all right to go in and talk to him, she didn't mention what his condition was; [212] she didn't answer that question, did she, what his condition was?

A. No, sir, not definitely. She says it's all right to go in and talk to him.

Q. Yes, but I am talking about his condition. Did she say that he was sick?

A. No, she didn't say how bad off he was.

Q. She didn't say anything about his physical condition, did she?

A. No, sir.

Q. Now, after the nurse gave you the permission, did you ever go to any doctor on the staff, any one of them at District General Hospital, and ask them if this man was in a physical and mental condition sufficient for you to talk to?

A. No, sir.

Q. Did you ever go to any doctor at all or interne at D. C. General Hospital?

A. No, sir, not that I recall.

Q. So the only two people you went to to ask permission was a nurse and a policeman; is that right?

A. That is right.

Q. I wonder if you would describe to us what you meant and referred to when you said a strong arm room?

A. I said a strong room.

Q. A strong room?

[213] A. Yes.

A. Well, I didn't know what they meant by a strong room when they told me that.

Q. Who told you that?

A. Whoever I got the information from that he was there, where he was. They said he's in the strong room at Gallinger Hospital. I didn't know what they meant; I have never been there before.

[214] Q. When you got there, at least in this room and had permission—now describe this to us, will you, please, this strong room?

A. It has possibly a dozen or maybe 14 beds in it; it is a large room. It has bars across it and it is locked. The officer had to get the key, unlock the door and allow me to go in.

Q. Now it is the police officer?

A. Yes, sir.

Q. Who got the key?

A. Yes, sir.

Q. Opened the barred door and let you in?

A. Yes, sir.

Q. And did Chief Roberts go in with you?

A. Yes, sir.

Q. Up to this time, when the policeman opened up the [215] strong room with the key and you went in, had you talked to Green at all?

A. No, sir.

Q. Now you are inside the room. Did the officer lock the room behind you?

A. I am not positive whether he did or not.

Q. Then you walked in, and how many people were in the room?

A. I would say a dozen, approximately a dozen.

Q. Who did you ask for? Now you are in the room. How did you know who to talk to?

A. I asked the nurse who was Mr. Green.

Q. That is before you went in?

A. Yes, sir.

Q. Okay. Now when you are talking to the nurse before you went in, you are outside of this strong room and it is closed, isn't it?

A. Yes, sir.

Q. What did you ask her?

A. Asked who, the nurse?

Q. Yes.

A. I asked her if it is all right if I could go in and talk to him.

Q. Yes, but how did you get to know which one of the 12 in the room was Green?

[216] A. She pointed him out and said that's him over in the corner bed.

Q. When did she do that, before or after the policeman opened the door?

A. Well, that I am not positive, whether it was before or after.

Q. Did this nurse go in the room with you and did the chief marshal?

A. Yes, sir.

Q. And was it a male or female?

A. It was a girl.

Q. And she was on duty there at that hospital at that time?

A. Yes, sir.

Q. Now that is three of you going in, the nurse, you and the fire marshal?

A. Yes, sir.

Q. Is that right?

A. That is right.

Q. Now when you went in, who was the first one to speak after you got in the room?

A. I wouldn't be definitely sure of that, whether it was the fire marshal or myself.

Q. Was Green lying in bed at the time or was he up and walking around?

[217-218] A. He was lying in bed.

Q. And then who was the first one to speak in the room?

A. I am not sure. I know I did speak to him almost immediately as we went in, "Hello, Mr. Green"; I shook hands with him.

Q. Is he still in bed at the time he is shaking hands?

A. He raised up. He sat up on the bed.

Q. You shook hands with him, did you?

A. Yes.

Q. What is the first thing you said to him?

A. I asked him, "Mr. Green?"

He said, "Yes."

I said, "Well, I would like to talk to you."

I identified myself and the fire marshal was along with me. I am not sure what the fire marshal might have said to him, but I am sure he said something.

Then I began to ask him, "Where were you when you discovered the fires? What happened up there? What can you tell me?"

And he began to tell me the conversation about the first.

Q. Did you examine him in any way?

A. Yes. I asked him, I said, "How bad are you hurt?"

* * * * * * *

[219] Q. Now my question is, did you physically examine Mr. Green when you approached the bed in which he was lying in the strong room?

A. He pointed out to me certain things on him and I looked at them. I didn't feel them. I didn't examine them, because I wouldn't know, anyway. He had a patch across his chest, I know that.

Q. What do you mean, a patch?

A. A bandage with adhesive tape across about the center [220] of his chest here, I would say, about a four-inch bandage across the center of his chest.

Q. A four-inch square bandage across the center of his chest?

A. Yes, sir.

Q. Did you say it was adhesive or did it go around him?

A. Just tacked on with a little piece of adhesive around the edges.

Q. And, of course, obviously you didn't know what the wounds were that were underneath that, did you?

A. No, sir.

Q. Okay, now what other marks?

A. He showed me two small dots, marks, underneath, on each side of his throat here, right underneath his chin (indicating).

Q. Were they covered by a bandage?

A. No, sir.

Q. You describe them to us, the two.

A. About the size of the head of a pin, I would say.

Q. Would you say about the size of the head of this instrument which I am now showing you, which is Government's Exhibit No. 2, a pick; would you say about that size?

A. Yes, sir. They weren't very large. They were tiny places there.

Q. When you say they are not very large, you don't mean [221] an open gap wound? For instance, this doesn't make that kind of a wound, does it?

A. That is right.

Q. You stick it in the flesh and pull it out and the flesh closes and you see a pinhead with this; right?

A. Right.

Q. How many of those were there?

A. Two, one on each side of his neck, just underneath his chin.

Q. Here (indicating)?

A. Yes.

Q. Did they have medication on them or were there any signs of blood or any signs of medication or were they open and raw?

A. I am pretty sure they had been painted with some kind of a——

Q. So there was some type, you believe, of medication?

A. Yes.

Q. Now, let's go to any point in back of his head. Did you see anything?

A. No, sir, I didn't see any mark on the back of his head.

Q. Now, if you can, tell me how you tell us the time when you arrived there at Gallinger.

Your Honor, ordinarily that is not important, but I want [222] to try to get it up with the time he left the other hospital.

A. It was approximately 3:00 p. m.

Q. Did you sign any papers in there at Gallinger showing

a visitor's pass or a visitor's application to be permitted to go through the hospital or anything of that kind at the front desk?

A. No, sir, not at the front desk.

Q. Or did they issue you a pass?

A. No, sir.

Mr. FORD: Your Honor, that, I think, is all I have to ask him. That brings me up to the conversation itself at that point.

The COURT: Mr. Flannery.

By Mr. FLANNERY:

Q. Now you say that during this conversation he was sitting on the side of the bed and also during part of it he was standing?

A. That is correct, yes, sir.

Q. Will you tell us, please, what the conversation was that you had with the defendant, Green; what did you say to him and what did he say to you at that time?

A. I asked him where he was when the fires took place or when he first smelled smoke, and he said he was upstairs in bed, that he had awakened about 7:00, the usual time, [223] got up to go down and make coffee, and as he descended the stairway, coming down to the first floor, he smelled smoke. And he came on down to the first floor.

I asked him if he attempted to find any fire on the first floor, and he said no, that he figured it must be coming from the basement. He said he went on into the kitchen, opened the door to the basement steps from the kitchen, snapped on the light and went on down. He said that the smoke got stronger as he went down the stairway to the basement. As he got to about the foot of the stairway, he said, this tall, heavy-set, light-skinned colored fellow moved at him from in the smoke toward the steps. He said the man didn't utter a word. He shoved him, knocked him onto his back. He got astraddle of his stomach, and he said he had a long, shiny dagger in his hand about that long (indicating), with a hilt on it. He had it in his right hand.

Q. When you say that long (indicating), for the purpose of the record,——

A. About that long (indicating). That is the way he measured it for me.

Q. Would you say six to eight inches?

The COURT: For the purpose of the record, about how far?

The WITNESS: About six inches long, that is the way he measured, about six inches long.

[224] Mr. FORD: Well, we can agree that this dagger here is between four and six inches long.

Mr. FLANNERY: Yes.

The WITNESS: He said that the man didn't utter a word; he just started jabbing him in the chest as hard as he could, and he said he was sticking it right up to the hilt.

By Mr. FLANNERY:

Q. Up to the hilt?

A. Yes, sir.

So he said he jabbed him maybe a dozen times, he doesn't know how many times.

I asked him if he struggled, if he tried to protect himself, if he hollered out or tried to give any warning.

He said no, that he didn't; the man was on him, jabbing him so hard and so fast that he didn't have time to do anything. So he said finally the man just got up off of him and ran toward the rear of the building, and he didn't know where he disappeared. He then said the fire was burning right bad right near were he was lying on the floor, right opposite the bathroom door, and he crawled right on into the bathroom because he remembered there was a bucket in there that he usually kept; and he was going to get the bucket to put the fire out. He said he couldn't find that bucket. So then he said he decided to run some water in the bathtub so that he could get in the bathtub and put his nose [225] down close to the water and breath.

I asked him if he attempted to get back up the stairway, and he said no, that he was trying to get the bucket to put the fire out. And then he said that he then heard the firemen crashing in the front door and he heard the sirens coming first, then he heard the firemen crashing in the front door. They came on back and they found him and they dragged him out. He said as they were dragging him out of the basement, he lost one of his shoes, so he said he didn't have any shoes.

Q. He didn't say he was unconscious when the firemen took him out?

A. No, he never said he lost consciousness. He said he was just trying to hold his head down close to the water so he could still breath and not be suffocated from the smoke. So he said they then took him on to Emergency Hospital.

Q. Did you ask him anything else? Did you ask him whether or not he had written any letters?

A. Oh, yes, I asked him if he had—I asked him if he had been writing, if he had written any letters that night, and he said no, he hadn't been writing.

And I said, Well, I saw a box of stationery and his reading glasess on the table there and a pencil, I thought maybe you might have been writing, and he said no, I hadn't.

I also asked him when he came down the stairway and [226] he smelled smoke if he knew that there was a fire in the building, and he said yes, there must be a fire in the building.

And I asked him if he had attempted to go to Miss Betty Brown's room to arouse her to get her out of the building or turn in an alarm, and he said no, that he figured he could go on into the basement and if there was a fire down there, he could put it out and that would be all there was to it.

Q. Did he tell you anything about knowing that Miss Betty Brown was dead already or did he say anything to that effect?

A. No, he never mentioned that fact.

Q. What, if anything, else happened, or does that cover it?

A. That pretty well covers it.

I asked him if he knew who set the fires. He said no, it must have been that colored fellow that attacked him that set the fire.

Mr. FLANNERY: Now, Your Honor, this witness also two days later, on May 28, had occasion to again question this defendant. Do you think we should go into that, too, at this time?

Mr. FORD: I would like to clear up this particular one, Your Honor, because of its close proximity to the happening of the events.

The Court: Suppose you cross examine as to this event

[227] and then, Mr. Flannery, you may inquire as to the later occasion.

By Mr. FORD:

Q. Did Chief Roberts or did he not question Green in this strong room on the occasion and at the time we are talking about?

A. He only talked to Mr. Green briefly. He didn't hear all of the conversation.

Q. He didn't hear?

A. He didn't hear all of our conversation.

Q. Who do you say didn't hear it?

A. Chief Roberts.

Q. Why didn't he hear it?

A. He says, well, I'm going on outside here and talk to the policeman or somebody; I don't know where he was going.

Q. So he left before all of the conversation took place and that is what you predicate your answer upon; is that right?

A. Yes, sir.

Q. Did the nurse leave, too?

A. Yes, the nurse didn't stay there and hear the conversation.

Q. So that all of this conversation that you are talking about was only had by you and not in the presence of anybody else, neither the nurse nor the chief, except you and [228-232] this defendant; is that right?

A. That is, all of the conversation. Part of the conversation Chief Roberts heard, and how much I am not sure, but not much of it.

* * * * * * *

[233] EVERETT D. GREEN, the defendant herein, was called as a witness in his own behalf, and having first been duly sworn, was examined and testified as follows:

EXAMINATION ON VOIRE DIRE.

By Mr. FORD:

Q. Now, Mr. Green, I wish you would speak slowly and keep your voice up so His Honor may hear you and Mr. Flannery may hear you.

What is your full name?

A. Everett D. Green.

Q. How old are you?

A. I am at the present time 64 and approximately a half.

Q. And you are the defendant in this case?

A. Yes, sir.

[234] Q. Now, Mr. Green, my questioning at this particular time is only going to relate to the incidents of the 26th of May.

A. Yes, sir.

Q. I am limiting it to that.

Now, on the 26th of May, do you recall at sometime in the morning when you were carried out of a certain premises?

A. I would imagine it was around 8:00 o'clock.

Q. In the morning?

A. Yes, sir.

Q. Do you recall the date?

A. The 26th of May, '53.

Q. These premises,—what is the address?

A. 1115 Massachusetts Avenue, Northwest.

Q. Did you on that day live there?

A. Yes, sir.

Q. At the time, who carried you out, do you recall?

A. I don't recall who carried me out. I was carried out evidently from the basement bathroom, and I didn't realize anything until after I got out there and they shot some oxygen into me.

Q. Where were you when the firemen were administering the oxygen to you?

A. I was on the front sidewalk on the stretcher of the rescue squad.

[235] Q. Then were you taken anywhere?

A. They carried me to Emergency Hospital.

Q. Do you know where Emergency Hospital is located?

A. Yes, sir, on New York Avenue, in the 1700 block.

Q. Northwest; correct?

A. Yes, sir.

Q. What happened when you got to Emergency?

A. They carried me in what I thought and was almost certain was the emergency room. I was on a slab there practically all day long up until about 3:30, when they transferred me to Gallinger.

Q. So that you were in the emergency room, until about what time of the day?

A. Approximately between 3:00 and 3:30, to be accurate.

Q. When they took you from Emergency—to where?

A. To Gallinger Hospital.

Q. How were you taken there on that afternoon?

A. In the Health Department ambulance. There was a policeman inside there sitting alongside with me there.

Q. In this ambulance which carried you at 3:00 or 3:30 from Emergency, were you on a cot?

A. I was on a stretcher laying out flat, with nothing but a sheet over me, not any article of clothing on whatsoever.

Q. But, however, you were on a stretcher?

A. Yes, sir.

[236] Q. What we call a stretcher.

And were you carried out of Emergency Hospital to the ambulance on a stretcher?

A. Yes, sir.

Q. And then on that stretcher were you transferred to the ambulance?

A. Yes, sir.

Q. And was it in that ambulance that you were taken to Gallinger?

A. Yes, sir.

Q. Now, when you were in Emergency Hospital, after you got there, say, around 8:30 in the morning until 3:00 or 3:30 when you were transferred from there, did you receive any medical treatment while you were in Emergency?

A. Yes, sir. They sterilized the wounds in my chest; they probed in some of them, and they treated the two wounds in my neck, one on each side, and I had nine stab wounds by that ice pick in my chest. Now the homicide officer——

Q. Wait, you are leaving these occasions. I want to stick right to this occasion.

A. All right.

Q. And you did receive medical treatment from the doctors and the nurses at Emergency; is that correct?

A. Yes, sir. To add to the treatment there, I was blinded by the smoke and the soot, completely blinded. I couldn't [237] see a thing.

Q. By the way, I notice you wear glasses. Directing your attention to May, could you see without glasses?

A. Very little; everything is blurred.

Q. What is your sight without glasses?

A. Just about 50 percent of what it ought to be.

Q. And on that occasion, did you have your glasses with you?

A. No, sir. They were lost somewhere along the route or in the house, I don't know where.

Q. Did you have any glasses when you were taken to Gallinger?

A. No, sir.

Q. Were you ever furnished any glasses at any time?

A. I applied for glasses at the D. C. Jail, which ought to have been issued to me, but they made a bluff and——

Q. We wouldn't go into that. What I mean is whether or not you had glasses when you were at Emergency or when you were in Gallinger that afternoon. Did you have glasses?

A. I think the homicide officer picked up my reading glasses at the house and brought them over to Gallinger to me.

Q. What was your physical condition when you were taken to Gallinger Hospital, either your physical or mental condition, when you were taken over to Gallinger Hospital that afternoon?

[238] A. Well, while I was in Emergency Hospital, about the middle of the day I asked the nurse if she would please get me a swallow of water.

She says, I will have to ask the doctor first.

Well, the result was I didn't get any water, nothing to eat in any way, shape or form until I left there between 5:30 and 4:00 o'clock.

Q. Now in the afternoon, when you were at Gallinger

Hospital, did there come a time when certain firemen came to see you in Gallinger Hospital that afternoon?

A. Yes, sir, Inspector Kelly and another officer.

Q. Can you locate about what time that was?

A. I think they had had supper. I had had a small piece of fried chicken and something light, and I had finished it and was lying flat on my back in the bed.

Q. What kind of a room were you in at that time?

A. It was a ward with about six to eight beds in it, not 12 as the man said.

Q. You just tell us what they were, not what they were not, you see.

A. Yes.

Q. Was it a locked door?

A. Yes, sir, they had a locked door to it.

Q. Could you describe that door any further?

A. It had an opening in the top, it was just with cross-wires, diamond shaped, heavy wires over the top, where a [239] large glass would normally be, and that was open for the air.

Q. Now when these firemen came to see you, up until the time they came to see you, or at the time they came to see you, how did you feel?

A. I felt pretty bad.

Q. I wonder if you can describe how you were feeling physically and mentally at the time the firemen came in the room to see you, into the locked room?

A. I was weak and slightly dizzy.

Q. Did you have any pains of any kind?

A. I have had pains in my chest ever since the thing happened from time to time.

Q. The question is, did you have any at the time that the officers were there?

A. Oh, yes, sir.

Q. Were you in the bed or out of the bed or sitting up or lying down, which was your position in the bed, when the firemen came?

A. I was completely lying on my back the entire time they were in, with one exception just before they left, and I will tell you why I propped myself up on my elbows and raised up and spoke a little later on.

Q. Were they there a time when you did raise up on your elbows?

[240] A. That was just when they suggested something to me that I didn't like.

Q. What was the first thing that the firemen, anyone of them, said to you at the time they came in the room when you were lying in bed?

A. The only one that had anything to say to me was Inspector Kelly. The other man ever opened his mouth at any time.

Q. So the only one you had conversation with or he with you was Inspector Kelly, and the other foreman never talked to you at all?

A. No, sir, he stood back by the foot of the bed.

Q. He stood there at the foot of your bed?

A. Yes, sir.

Q. Now what was the conversation between you and Inspector Kelly at Gallinger?

A. He questioned me quite a bit about the fire and so forth, about getting up and which steps I came down, and all such as that. And I told him about this man coming up to me as I got to the foot of the steps in front of the bathroom, hitting me and knocking me out, and like that, and then he got off finally. After considerable conversation—well, he wasn't in the room, I should judge, not over three or four minutes—then he said to me—this was the point that brought things to a close.

[241-252] Q. What was it he said?

A. I will add now what I had on. I didn't have a thing on, nothing but a sheet over me in bed.

Well, when he said to me, "Now, look here, Mr. Green, you're getting up in years and," he says, "you know you're not very long for this world. Why don't you clear yourslf with your keeper?"

Q. Why don't you what?

A. "Why don't you clear yourself to meet your keeper." That was his words, to meet your keeper.

At that, I was lying flat down, I raised up on my elbows. I says, "What in the hell are you sons of bitches trying to do to me, anyway?" They were my words.

At that, they turned around and walked out and the conference came to an end.

Q. And approximately how long would you say he was there?

A. Well, he wasn't in there three minutes.

* * * * *

[253] By Mr. FLANNERY:

Q. Now, Mr. Green, how long did you stay there at the hospital?

A. I stayed there Thursday night—no, Tuesday night, from 3:30 to 4:00 o'clock on, all day Tuesday—no, all day Wednesday, and Sergeant Best from No. 2 Precinct came there with what I think was his boss, a captain, because he had gold braid all over him, around 11:00 o'clock, and they carried me to the morgue.

Q. You walked over to the morgue, didn't you?

A. No, I didn't.

Q. Were you taken on a stretcher to the morgue?

[254-260] A. No. I will tell you what happened. I was undressed. They brought in some clothes over there and I put them on, and they didn't give me any assistance taking hold of my arm and I had to steady myself on the side of the wall as I walked down the hospital.

Q. In any event, you did go over to the morgue on the 28th, didn't you?

A. Yes, sir.

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[261] Dr. DONALD A. BROOKS, was called as a witness for the Government, and after having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION.

By Mr. FLANNERY:

[262] Q. Now, doctor, in connection with your duties at the District of Columbia General Hospital in May of 1953, did you have occasion to treat one Everett Green?

A. I did.

Q. At the time you saw Everett Green, did he have some injuries?

A. Yes, he did.

Q. Will you describe to the jury what injuries he had?

A. He had several stab wounds, flesh wounds, about the lower part of his chest in front.

Q. What do you mean by flesh wounds?

A. Well, I mean by flesh wounds that the wounds, on the basis of our examination, did not penetrate beneath the flesh.

Q. Did not penetrate beneath the flesh?

A. That is right.

Q. Now, go ahead.

A. And he had these wounds about the lower part of his chest in front.

Q. Keep your voice up a little bit, will you?

A. He had these wounds about the lower part of his chest in front and he had one small similar wound on either side of the lower neck in front.

Q. Where on the neck; would you indicate on your neck?

A. About in that region (indicating) on both sides.

[263] Q. What type of wounds were they? Were they deep wounds or not?

A. They were not deep wounds. They were superficial wounds.

Q. Had the wounds on the chest penetrated any vital organ?

A. They had not.

Q. Were they superficial also?

A. Yes.

Q. Doctor, I want to show you what has been marked as Government Exhibit No. 7 for identification, which is a record from the District of Columbia Hospital dealing with the treatment of Everett Green, and I will ask you, does that record reflect when Everett Green was admitted to the hospital?

A. Yes, at 2:10 p. m., on May 26, 1953.

Q. And when was he released from the hospital?

A. At 11:00 a. m., on May 28, 1953.

Q. Was there a diagnosis made in his case?

A. Yes, there was.

Q. Did you make it?

A. I did.

Q. What was the diagnosis?

A. Superficial stab wounds of the chest and smoke inhalation.

Mr. Flannery: That is all the questions I have.

[264-266] Cross-examination.

By Mr. Ford:

Q. Dr. Brooks, you were just asked when he was discharged from the hospital, and you said the 28th?

A. That is correct.

Q. For what purpose was he discharged from the hospital on the 28th?

A. His treatment was completed at that time and he was deemed well enough to be discharged from the hospital.

Q. Are you sure of that?

A. Yes, sir.

Q. Let me ask you this——

A. He was discharged in custody——

Q. Sir?

A. I believe he was discharged at the particular time that he was at the request of the police.

* * * * *

[267] By Mr. Ford:

Q. Now, doctor, I am holding in my hand Government's Exhibit No. 2. Now, assuming that I stick this in my body, at least half the length of this blade, and I don't touch any vital organs—because there are places you can stick it in without touching vital organs; correct?

A. You mean in the chest?

Q. Yes, or in my body, sure.

A. That would depend on the depth of the wound.

[268] Q. This instrument I am talking about, just shaped like this—and then I pull it out.

A. Yes.

Q. Now, after I have pulled it out, and you look at the place where I stuck it in and pulled it out, what will you see?

A. I will see a stab wound or a laceration of the skin.

Q. What else will you see? Would it be a big spot, an open wound or what will it leave, this type of instrument?

A. With that type of instrument, it probably would not be a large opening.

Q. Let me ask you this, and I am limiting it now to this type of instrument, Dr. Brooks. In fact, as I pull it out, my flesh closes on the hole that was there, doesn't it, as I draw it out?

A. As a rule it does, yes.

Q. And after I did that you were to take me and put me in an X-ray machine and take an X-ray picture, what would the X-ray show, if anything?

A. That would depend upon whether or not certain vital organs underlying the wound were injured.

Q. Right, Doc; but remember now, we said where it does not hit any vital part.

A. Oh, I see, I am sorry.

Q. So that is part of the question; right?

[269] A. Yes.

Q. So where it doesn't touch anything, it wouldn't show anything, would it?

A. No, it wouldn't show anything at all.

Q. It wouldn't show the wound at all; right?

A. That is right.

Q. Now, how would you probe the depth of that wound after I pull it out; how would you tell how far in my body it went?

A. We have probes that are used for that purpose.

Q. And the probe is an instrument that you would take and what, put it in at that spot?

A. That is right.

Q. And then go in from there?

A. That is right.

Q. And did you do that with this defendant at the different wounds and all of them?

A. I did not personally do it. It was done by a subordinate physician.

The Court: Talk up just a little louder. The jurors down there are having a little difficulty hearing you.

The Witness: Yes, sir.

By Mr. Ford:

Q. Just a minute. Doctor, you didn't do it; correct?

A. That is correct.

[270] Q: You weren't present when it was done, so you didn't see it done?

A. I did not see it done.

Q. So that when you were about to tell us what you believe, that was because of something that was told you; right? In other words, you don't know of your own knowledge that that probing was done because you didn't personally do it, and you weren't present when somebody else did it; right?

A. But I feel sure that——

Q. Well now, wait. It is all right about you feeling sure, but——

A. That is correct.

Mr. Ford: I submit, we are proper when we——

The Court: Yes, you didn't see it and weren't there when anybody else did it; is that correct?

The Witness: Yes, sir.

[271] By Mr. Ford:

Q. Doc, you know from your records that prior to the time the patient was taken to you, he had been to another hospital and received treatment and examination at the other hospital, to wit, Emergency Hospital; right?

A. That is correct.

Q. And, of course, you don't know what the doctors or the interns did at Emergency Hospital in their treatment when they received this patient, do you, of your own knowledge?

[272] A. There is a record here, though.

Q. Other than that record.

A. Other than that record, I do not.

Q. And you don't know who the doctor was who treated him on the morning of the 26th, do you?

A. Not other than is shown by the records.

Q. But you don't know whether he was a surgeon like yourself or whether he was the intern; right?

A. I don't know what, whether it says here or not, but I don't personally know.

Q. When you looked at the patient when he was brought to Gallinger from Emergency, you saw on him some evidence that he had been treated somewhere before he got to you, did you not?

A. I did.

Q. For instance, did he have bandages or anything like that?

A. He had bandages on his chest.

Q. And you knew also that prior to the time they brought him to you for examination, that he had been bathed, such as if there was blood around or anything of that kind, right, or whatever doctor or intern had treated him before, he certainly would, you assume, clean him and wash him so there would be no infection from the wounds?

A. Actually, he cleaned the wounds.

[273] Q. So therefore the patient, as he came to you, would have had that done before he got to you; right?

A. That is correct.

Mr. Ford: We have no further questions of Dr. Brooks.

Redirect Examination.

By Mr. Flannery:

Q. Dr. Brooks, the patient, Green, was discharged because he was well; isn't that right?

A. Perhaps I can clear that up somewhat. We have a routine. We had a routine of discharging patients at any time of day that it was most convenient to discharge the patient. I made the statement to the other attorney that he was discharged at the particular time that he was discharged because it was for the convenience of the police officers. I think he would have been discharged that same day later on, anyway, I believe he would.

Q. In any event, you wouldn't have discharged him if he hadn't been well, would you?

A. I would not.

Q. Now Mr. Ford showed you this ice pick here, which is Government Exhibit No. 2 for identification, and asked you if this ice pick had penetrated someone's body to the length of half the length of this blade, would it leave a small hole, and I believe you said yes, didn't you?

[274-277] A. Yes, usually.

Q. As far as this particular case is concerned, as far as the injuries on this particular man, Green, is concerned, in your opinion, were the injuries on his chest, which you have described as superficial, of such a nature that they

would have been caused by an ice pick of this length going in half its length?

A. In my opinion, no.

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[278] WARREN C. KELLY was recalled as a witness for the Government, and having been previously sworn, was examined and testified further as follows:

DIRECT EXAMINATION (resumed)

By Mr. FLANNERY:

Q. Now, Inspector Kelly, I direct your attention to May 26th, in the afternoon of that day, did you have occasion to talk to the defendant, Green, in this case, the afternoon of May 26th?

[279] A. Yes, sir, I did.

Q. Where was it that you talked to him?

A. At Gallinger Hospital, which is now known as D. C. General Hospital, in what they call the strong room there.

Q. About what time was that?

A. About 3:00 o'clock p. m.

Q. Was anyone with you?

A. Yes, sir, Fire Marshal Roberts.

Q. Will you describe to what part of Gallinger Hospital you went to see Green?

A. It was on either the second or third floor of the east wing there, and he was inside of a room which had bars around it, with a locked door, with about 12 or 14 other people in a ward. I asked the officer who was on——

Q. You spoke to an officer? No conversation with anybody else now.

A. I spoke to an officer there. I spoke to a nurse there, and I entered the room where Mr. Green was, along with Fire Marshal Roberts.

Q. As a result of the conversation with the nurse and the other person?

A. The officer, yes.

Q. When you entered the room, how many beds were in that room?

A. I would say 12 or 14 at least.

[280] Q. Were they occupied?

A. Yes, sir.

Q. Where was Green?

A. He was in the left-hand corner as you enter the room; over by a radiator, the last bed over to the left.

Q. Was he in bed?

A. Yes, sir.

Q. What did you do then?

A. I approached the bed and introduced myself, asked him if he was Mr. Green. He said he was. I asked him if I might talk with him about the fires at 1115 Massachusetts Avenue, Northwest. He sat up on the edge of the bed and we began talking.

Q. You say he sat up on the edge of the bed. Will you describe what you mean by that?

A. He was lying in a flat position when I entered and he raised up after we said a few words, and he sat up on the edge of the bed, and then during part of the conversation he stood up and stood alongside the bed.

Q. Will you describe what conversation you had with Green relative to the fire at 1115 Massachusetts Avenue?

A. Fire Marshal Roberts didn't stay but a very short while.

Mr. Ford: I move that that be stricken out. He was asked to tell a conversation he had with Green. He starts [281] talking about the fire marshal.

The Court: Yes, just think of the question, please.

The Witness: I asked Mr. Green what he could tell me about the fires that had occurred at 1115 Massachusetts Avenue this morning. And I asked him where he was when he discovered the fires and what he did when he discovered the fires.

He said that he awoke about 7:00 a. m.; he got out of bed and started down the stairs to the kitchen to make coffee, as was his general routine, and as he was coming down the stairway to the first floor, he smelled smoke, a faint odor of smoke, not strong. He didn't stop on the first floor. He went to the rear kitchen and opened the door to the basement steps leading downstairs, and turned the light on and started down the basement stairway. As he got further down the stairway, the smoke began to get denser, and about the time he got to the foot of the stair-

way, he saw a large, tall, light-skinned colored fellow approach him from out of the smoke, come toward him with a dagger in his hand, a shiny dagger which he indicated about that long (indicating), about six inches long, and that the man struck him in the chest, knocked him on his back and jumped on top of him, astraddle his stomach, and began to stab him with the dagger as hard as he could stab him.

I asked him if he cried out for help, if he struggled or [282] attempted to defend himself, and he said no, that the man had him pinned down and he was afraid to do anything, so he lay there.

Q. Did he say how deep the dagger penetrated?

Mr. FORD: I object to that as being leading. The witness is telling the story.

Mr. FLANNERY: It is not leading.

Mr. FORD: Oh, yes, it is and it is suggestive, too, of a certain topic. Let him tell us.

The COURT: Sustained.

By Mr. FLANNERY:

Q. Very well, did he say——

Mr. FORD: Wait a minute. I object.

Mr. FLANNERY: I haven't asked the question yet.

Mr. FORD: Yes, but he was telling the story and he was interrupted, and I submit he is entitled to go right on and tell it.

Mr. FLANNERY: I have a right to ask questions, Your Honor.

The COURT: You may place your question.

By Mr. FLANNERY:

Q. Now, did he say anything else?

A. Yes. He said that the man got up off of him voluntarily and just without saying a word and he disappeared toward the rear of the building, and he said he left this [283] thing sticking in him, and he said it was up to the hilt, and he had to really pull and tug to get it out of him.

Q. He said it was up to the hilt?

A. Yes, sir.

Mr. FORD: Wait a minute. I object to him interrupting and then picking out a particular part under the guise of repeating what he says, like up to the hilt, picking out frightening sentences that are frightening no one.

Mr. FLANNERY: There is no guise being used here. I am just trying to elicit the facts from this witness.

Mr. FORD: Then let him do it. He is doing very we...

The COURT: Very well, I think no harm has been done.

By Mr. FLANNERY:

Q. Proceed, will you, please?

A. He said then that after the man disappeared toward the rear of the building, he crawled into the bathroom; this fire was burning all the time very near where they were struggling, and he said he crawled in the bathroom because he knew he kept a pail in there and he wanted to get it full of water to try to put the fire out. And he couldn't find the pail when he got into the bathroom. So he let some water into the tub, got down into the tub, put his face down near the water so that he would breathe good. [284] When I asked him had he attempted to get out the window of the bathroom to the outside, he said no. I asked him if he had attempted to go back upstairs to alert Miss Brown of the fires and so forth, and he said no.

Q. All right, now, did you ask him any more questions and did he say anything else?

A. I asked him if he remembered firemen coming in there and he said that he heard the sirens while he was in the bathtub, that he heard them breaking the front door open. He remembered them coming in and dragging him out of the bathtub, and on the way out in dragging him out of the basement, he lost one of his shoes, and they then took him to the outside and took him to Emergency Hospital.

Q. Did you ask him any more questions?

A. I asked him if he had been writing, and he said no, he hadn't. That was about the extent of the conversation.

Q. Did you ask him whether or not he had written any letters?

Mr. FORD: I object to that as being grossly leading and suggestive to the witness, picking out a topic, to wit, a letter, picking out a writing and so forth, after the wit-

ness had said that was the extent of the conversation and did not include it.

Mr. FLANNERY: I think it is a proper question, Your Honor.

[285] The COURT: Objection overruled. You may answer.

The WITNESS: Yes, I asked him if he had been writing, if he had written a letter or a note of any kind, and he said no.

By Mr. FLANNERY:

Q. Was that just about the extent of your questioning of him and his answers to you?

A. Yes, sir, so far as I can recollect, that is it.

Q. Now, approximately how long did you talk to Green on that day?

A. Approximately an hour.

Q. Now then, did there come a time subsequent to May 26, 1953 when you had occasion to talk to the defendant, Green, again?

A. Yes, on May 28th, the second day later, I accompanied Sergeant Couture and Sergeant Clarke from the Homicide Squad to Gallinger Hospital again, between 9:00 and 9:30 in the morning, and we three talked to Mr. Green together.

Q. Now will you please relate what Mr. Green said in your presence at that time relative to this fire and the circumstances surrounding it?

A. He told practically the same that he had related on the previous occasion, except he was shown an ice pick and asked if he had had that ice pick around the house, and he said he had two or three ice picks around the house, and asked him if this could be what was used on his chest instead [286] of a dagger, and he said yes, that he does remember now, since he sees the ice pick, that it was an ice pick and not a dagger, because he remembers having to pull it out and it was hard to pull out of his skin. He pulled it out himself, and he does definitely remember then that it was an ice pick.

Q. Was he asked any other question?

A. He was shown a letter and asked if he had written this letter, if that was his handwriting, his signature, and he said yes, that he had written this letter that was shown, and that he had enclosed forty-dollars in the letter.

I asked him when he wrote that letter. I asked him if he

wrote that letter before he smelled smoke and before the fire, and he said yes, I did.

Q. I show you Government Exhibits 4 and 4-A for identification. Is that the letter you just had reference to?

A. Yes, sir, this is the letter.

Q. Did you ask him why he had written the letter?

A. Yes, he was asked that question, and his reply was that he had known Miss Betty Brown for many, many years, they had been closely associated and that she should have the best and that he wanted her to have the best. That is the reason that he wrote the letter and enclosed the forty dollars for flowers.

Q. Was that about the extent of what he told you?

[287] A. Yes, sir, that was about it.

Mr. FLANNERY: That is all.

CROSS-EXAMINATION.

By Mr. FORD:

Q. Now, on the 26th, you say you went out to Gallinger Hospital at what time to interview the defendant?

A. About 3:00 p. m.

Q. And at that time you were a fireman and you were not a policeman; is that right?

A. That is correct.

Q. Prior to your going out there, you had talked to the policemen, though, did you not?

A. Yes, sir, I had.

Q. Who did you talk to?

A. Beg pardon?

Q. Who did you talk to?

A. Detective Sergeant Couture and Detective Sergeant Clarke.

Q. Who were both detective sergeants attached to the Homicide Squad charged with the investigation of deaths, weren't they, as police officers?

A. Yes, sir.

Q. Now, do you in the Fire Department have a homicide squad?

A. No, sir.

[288] Q. When was it you talked to both the detective sergeants from the Homicide Squad on May 26th?

A. That morning at the scene of the fire at 1115 Massachusetts Avenue.

Q. You knew who they were and you knew what their duty was, didn't you?

A. Yes, sir.

Q. Then you decided to go out in the afternoon around 3:00 o'clock, didn't you?

A. Yes, sir.

Q. Did you take a police officer with you to be a witness to this conversation, this lengthy conversation you have just recited?

A. No, sir.

Q. You just took a policeman with you; right?

A. Beg pardon?

Q. You just took a fireman with you; is that correct?

A. Yes, sir, Fire Marshal Roberts, yes, sir.

Q. That is the same gentleman who was here, isn't he, as a witness?

A. Yes, sir.

Q. And was he present when this conversation you recited took place at Gallinger?

A. Not all of it.

Q. Now you were asked to describe the room that the de-[289] fendant was in. Did you refer to it as a strong room that they had him in when you went there?

A. Yes, sir.

Q. How did you get in the room; who opened the door, if anybody, for you?

A. The officer let me in.

Q. So there was a policeman on duty there, was there?

A. Yes, sir.

Q. And he got a key and let you in?

A. Yes, sir.

Q. Now did you have the policeman as a witness to stand by and listen to what conversation you say took place?

A. No, sir.

Q. There was a nurse there, wasn't there?

A. Yes, sir.

Q. Was she inside with you two firemen at the time you said you had this conversation with the defendant?

A. No, sir, not all of the conversation.

Q. Did you take her in and ask her to be an independent witness or an outside witness to the conversation?

A. No, sir. She entered the room with us, but she didn't remain.

Q. Now about what time was it on May 26th when you say that you asked this defendant if he wrote any letters? And remember what I am asking: What time on May 26th was it that you asked the defendant whether or not he had written [290] any letters?

A. It was between 3:00 and 4:00 p. m., at Gallinger Hospital.

Q. When you had the conversation with the two detective sergeants in the morning, did they say anything about the defendant writing a letter?

A. No, sir, they didn't say he had written a letter.

Q. You know that the letter was not even received by that lady, do you not, until hours after you had been to Gallinger Hospital?

A. I didn't know when she received the letter.

Q. Then how did you, at 3:00 o'clock in the afternoon, on May 26th, happen to ask him if he wrote a letter?

A. Because I saw an open box of stationery laying on the table, a pair of reading glasses beside it and a pencil beside it, and I assumed that someone had been sitting there writing.

Q. So then, when you walk into a house and you see a table and there is letter paper on it and writing utensils, you assume that somebody had just written a letter?

A. Had been writing?

Q. Yes, had been writing a letter.

A. Yes, sir.

Q. And that in itself suggests to you to ask him if he wrote [291] a letter?

A. I asked him if he had been writing a note or a letter or anything.

Q. Did you use the word letter?

A. I suppose—I am not positive, but I asked him if he had been writing. I specifically asked him if he had been writing anything.

Q. And the reason that you did is because in this house you saw letter writing paper and utensils?

A. Yes, sir.

Q. And would you say that if you walked into my house now and saw letter writing paper and pens and ink you would start asking me if I wrote a letter?

Mr. FLANNERY: I object to that question.
The COURT: Sustained.

By Mr. FORD:

Q. Now, let's go to the time you got here to the premises on Massachusetts Avenue about the fire. You have testified here as an expert, haven't you?

A. Yes, sir.

Q. And you said that on that day you went throughout that house to make a thorough examination, didn't you?

A. I made an examination the best I could of the premises, yes, sir.

Q. In detail, all right?

[292] A. Yes, sir.

Q. It wasn't a superficial examination, was it?

A. It was in detail so far as my line of work is concerned, yes, sir.

Q. And there came a time when you arrived on the first floor; is that right?

A. Yes, sir.

Q. And there came a time when you entered a particular room on the first floor?

A. Yes, sir.

Q. And that was this elderly lady's room, wasn't it?

A. Yes, sir, that is right.

Q. And you went in it?

A. Yes.

Q. And you looked all over the place, didn't you, that room?

A. I didn't examine it as carefully as I examined the other room where the fires had occurred.

Q. Well, in the first place, you knew she had been carried out of that room, didn't you?

A. At the time I first entered, I didn't know which room she had been removed from. I learned later that she had been removed from the front room.

Q. When you learned later, didn't you want to make a careful examination of the room out of which this nice, [293-302] elderly lady was carried?

A. So far as fires are concerned, yes, sir.

Q. Or for any purpose that you saw, including the writing of letters?

Mr. FLANNERY: I object to that.

Mr. FORD: Well, he limited it and I wanted to broaden it.

By Mr. FORD:

Q. You were going to examine it for any purpose, for any leads, for any evidence?

A. That is true, yes, sir.

Q. Weren't you?

A. Yes, sir.

Q. And you did do that, didn't you?

A. Yes, sir.

Q. Now I am going to ask you, was there anything burned inside of that room?

A. No, sir, not burned.

* * * * *

[303] By Mr. FORD:

Q. Now, coming back to the questioning you say you conducted of the defendant, Green, on May 26th in the hospital, I think on direct examination you had shown to you what is marked Government Exhibit No. 6; correct?

A. That is right.

Q. Which is the box with these sheets in it; right?

A. Yes, sir.

Q. And you had that on direct examination.

Now is that the box and letter paper you were referring to when you said on May 26th that you asked the defendant at Gallinger Hospital about writing letters, that that is what motivated you, that article there?

A. Yes, sir.

Q. And that was on the 26th of May.

A. Yes, sir.

Q. Well, isn't it a fact that this box of paper wasn't discovered in Massachusetts Avenue and wasn't taken into [304] possession until May 28, 1953, as written on there in ink?

A. It was discovered on May 26th and removed on May 28th.

Q. You are sure of that, are you?

A. Yes, sir.

Q. Now on May 26th, when you went out to talk to the

defendant, after you talked to both police officers, and took with you the fire marshal, and when you had no policeman with you—on the 28th you say you went out with these police officers two days later?

A. Yes, sir.

Q. How does it happen you were with them and how did it come about that you went out with them on the 28th, or they with you or you with them, police officers, when you didn't take them out on the 26th, when you were going to question him or they didn't take you on the 26th or when they questioned him; how did that come about?

A. They had in their possession a letter which they said they wanted to ask Mr. Green specifically about. They asked me to accompany them.

Q. So it was at their request that you went out on the 28th?

A. Yes, sir.

Q. They didn't request you on the 26th, the day of the occurrence, did they?

[305] A. No, sir. I went out myself.

Q. And you didn't request them on the 26th?

A. No, sir.

Q. But on the 28th, they requested you to go when they questioned the defendant; is that it?

A. Yes, sir.

Q. Now, did you say you had this letter with you when you went out to Gallinger on the 28th?

A. The detective had in his possession.

Q. And it was opened up to him, wasn't it?

A. Yes, sir.

Q. And I think you testified on Direct that there were things you asked him about that letter?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now tell me, at the time, who was asking him about the letter, you or the detective sergeant?

A. The detective sergeant.

Q. The detective sergeant?

A. Yes.

Q. And you were present?

A. Yes, sir.

Q. And the letter was then open, as it is now; the contents were out; right?

[306] A. Yes, sir.

Q. And the detective had the contents in his mind?

A. Yes, sir.

Q. That is this part which I say contents, the writing; right?

A. Yes, sir.

Q. And as he had it in his hand, the detective read parts of that letter to him and asked him what he meant?

A. No, sir. He handed him the letter and he said, "Did you write this letter?"

Mr. Green looked at it and he said, "Yes, I did."

Q. Now on direct examination you referred to a certain part of it, didn't you? Did he ask him about any of its contents?

A. Oh, yes, I asked him when he wrote the letter. I asked him if he wrote that letter before he smelled smoke, before he knew there was any fire in the building, and he said yes, he had.

Q. Then did you ask or recite anything that was in that letter, any particular part of it all or any sentence in there or phrase or clause?

A. Well, he made the remark that we both want it this —rather, the reason he enclosed the forty dollars was for flowers for Miss Betty Brown's funeral, because he had always wanted to give her the best that she could have and that he thought a lot of her, they had been together a long [307] time, and he wanted her to have the best that he could give her.

Q. Did he in the course of that conversation tell you and the detective sergeant that that forty dollars was the last money he had in this world?

A. Yes, sir. he did.

Q. Did you and the detective sergeant, when you were asking about this letter when you had it, ask him what he meant when he wrote, "a fine and good lady, a true friend to me;" did you ask him what he meant by that?

A. He said that she had been a fine woman, a good friend to him, and that they had been together a long time and were very close.

The COURT: You must speak out for the jury. I know you gentlemen are pretty close there, but everybody must hear.

By Mr. FORD:

Q. And did you ask him what he meant by the next sentence, "We both want it this way"?

A. Yes, sir, and he didn't give an answer to that.

Q. Did you ask him about how friendly he had been with this elderly lady during the past 30 years?

A. Yes, sir. He said they had been together during the past many years, they had been very close friends. He had more or less looked out for her and she for him, and they were very close.

[308-309] Q. And did you ask him and did he tell you during that conversation that he waited on her hand and foot because she wasn't able to cook and he went to the store and did the cooking for her?

A. Yes, sir, that is right.

Q. And did you also ask him and did he tell you during those 30 years that when it was necessary for her to get up out of bed, he would lift her up and put her back?

A. Yes, sir, he would help her in and out of bed.

Q. And did he tell you or did you ask him or was it said during that conversation by any of you that during the past 30 years he would have friends of hers come and visit her and he would go out and get things, like jello and pound cake, so that they could have little parties together there, this elderly lady, himself and her friends?

A. Yes, sir.

Q. And did you ever ask him or did he ever tell you that during these 30 years of being together with this elderly lady, that they never had a cross word with each other or never fussed or fought or never had any trouble with each other?

A. He said they got along very well.

* * * * *

[310-333] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. FORD: Your Honor, may we approach the bench?
The COURT: Yes.

(At the bench:)

Mr. FORD: I reasonably anticipate that with the witness you are about to call, Detective Sergeant Couture, that you are going to ask him if he ever had a conversation with the defendant on the morning of May 26th, and that you are going to offer that in evidence; right?

Mr. FLANNERY: Well, I hadn't planned to call him as my next witness. I was going to call a shorter witness, Mr. Cornelius.

Mr. FORD: Oh, I saw Couture walk in.

While we are here, to save the Court's time, now we are going to challenge the first statement that Couture says or the first interview Couture says he had with the defendant, because he, Couture, interviewed him within one hour after the defendant was carried from the house, about 8:30, at Emergency, that Couture interviewed him at 8:30 on the 26th at Emergency Hospital, which is approximately one hour after he was carried from the scene. So we are going to challenge that one.

The COURT: Well, that being so, perhaps it will be necessary for me to hear that evidence out of the presence of the jury.

Mr. FLANNERY: Yes.
Mr. FORD: Yes.

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[334] LIONEL COUTURE was called as a witness for the Government, and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. FLANNERY:

Q. Will you state your name, please?
A. Lionel Couture.

The COURT: How do you spell your name?
The WITNESS: L-i-o-n-e-l C-o-u-t-u-r-e.

By Mr. FLANNERY:

Q. You are a member of the Metropolitan Police Force, are you not?

A. Yes, sir.

Q. You are attached to the Homicide Squad?

A. That is correct.

Q. On May 26, 1953, you were also a member of the Metropolitan Police Force, attached to the Homicide Squad, [335] were you not?

A. Yes, sir.

Mr. FLANNERY: May we approach the bench a moment, Your Honor?

The COURT: Yes.

(At the bench):

Mr. FLANNERY: This is the witness that Mr. Ford said that he wanted questioned out of the presence of the jury.

Mr. FORD: In other words, we challenge it because he is going to testify as to the statements made by this defendant at 8:30 on the morning of May 26th, being an hour or less after the time the defendant was carried unconscious from the scene.

The COURT: Very well, gentlemen, I will hear the evidence out of the presence of the jury.

Mr. FORD: You see, Your Honor, I would like to make this clear. We are not contending that he was struck, that the defendant was struck by any policeman or fireman or any interrogator, or that he pushed or shoved. We are not talking about that. We are trying to challenge it on the ground of his actual condition being such that a person in that actual physical condition couldn't make that.

The COURT: Very well.

(In open court):

The COURT: I will ask the jury to keep in mind the ad- [336] monition and absent yourselves from the courtroom until I call you back.

Whereupon, the jurors left the courtroom, and the following proceedings were had in the absence of the jury:

Mr. FLANNERY: Shall I proceed, Your Honor?

The COURT: Yes, you may proceed.

EXAMINATION ON VOIR DIRE

By Mr. Flannery:

Q. Sergeant Couture, in connection with your duties as a member of the Metropolitan Police Force, did you have occasion on May 26, 1953, to go to premises 1115 Massachusetts Avenue, Northwest, in the District of Columbia?

A. Yes, sir.

Q. With whom did you go there?

A. I went there with Sergeant A. D. Clarke from the Homicide Squad.

Q. When you responded to the scene there, did you stay there very long?

A. No, sir.

Q. How long did you stay there?

A. I didn't go in the house. I just stayed out in the yard a few moments, then I left and went to Emergency Hospital.

Q. Was that on information that you received there on the scene?

A. That is correct.

[337] Q. What time did you arrive at Emergency Hospital, your best recollection?

A. The best recollection, between 8:30 and 8:45 in the morning.

Q. When you arrived at Emergency Hospital, to what part of the hospital did you go?

A. I went to the emergency room.

Q. When you arrived at the emergency room, did you see the defendant in this case, Everett Green?

A. I did.

Q. Where was he?

A. He was in the emergency room, to the right on the first floor, in the emergency room. I would say it was an examination room. He was lying on a bed there or examining table.

Q. Was anyone else there in that room?

A. No, sir, not at that time. The doctor kept coming in and out and I believe the nurse kept coming in and out.

The Court: Mr. Flannery, I would like to know whether he was in the custody of the police at that time.

By Mr. FLANNERY:

Q. Was he in the custody of the police at that time?

A. There was no police officer there; no, sir, he was not.

Q. Do you know of your own personal knowledge when [338] it was that this defendant was taken into custody in connection with this case?

A. It was sometime around 10:00 o'clock, but I can't say the exact time.

Mr. FORD: Does that mean A.M. or P.M.?

The WITNESS: A.M., sir.

By Mr. FLANNERY:

Q. Do you know who took him into custody?

A. No, sir, I do not.

Q. What information do you have that he was taken into custody at 10:00 o'clock a. m. on that day?

A. Well, before leaving the hospital, I called the precinct and asked them if they would send a footman over to take charge of this gentleman until we return or until I return to the hospital.

Q. Were you the first policeman that talked to this defendant after this fire?

A. I don't know who talked to him at the scene, but I think I was the first one at the hospital.

Q. You were the first one at the hospital?

A. Yes, sir.

Q. And as far as you know, there was no other policeman there at the hospital in connection with this defendant, Green?

A. No, sir, because I had to call the precinct to send someone down.

[339] Q. Did you place him under arrest while you were talking to him?

A. No, sir, I did not.

Mr. FORD: I submit, I have had difficulty for 33 years determining when a man is under arrest.

The COURT: Well, that is often a very difficult question, and I did kind of want it cleared up whether this conversation was when the defendant was in custody or not, if we can establish it.

Mr. FORD: That is why I was going to object to his con-

clusion, because, Your Honor, I understand the law to be that if a policeman comes up to me and first makes his identity known to me as a police officer and tells me that and I receive that notice, that it might constitute an arrest at that particular time under certain circumstances, if it interferes with my freedom of going or coming or it makes any impression on me. I have run into that in search and seizures.

The Court: You may proceed.

By Mr. Flannery:

Q. Is it your testimony that you did not place him under arrest at that time?

A. Not at that particular time, no, sir.

The Court: You didn't at all, did you? Did you at all?

The Witness: No, sir.

[340] By Mr. Flannery:

Q. You never arrested him?

A. No, sir.

Q. As close as you can, when was it that you began to talk to this man?

A. As soon as I arrived at the hospital, I talked to him.

Q. And again, for the record, that was what time?

A. That was between 8:30 and 8:45.

Q. Before you talked to this man, did you make any threats to him?

A. No, sir.

Q. Did you promise him anything in return for what he might tell you?

A. No, sir.

Q. When you were talking to him, was he conscious or unconscious?

A. He was conscious.

Q. Did he appear to you to answer your questions clearly and coherently?

A. He did.

Q. At that time—well, what did you ask him and what did he say to you?

A. Well, I first asked him what his name was and then I asked him what happened.

[341]Q. What did he say when you asked him what his name was?

A. He told me Everett Green, Everett D. Green.

Q. Then what did you ask him?

A. I asked him what had occurred at 1115 Massachusetts Avenue.

Q. And what did he tell you?

A. Well, he told me that he had gone to bed about midnight the night previous, that he woke up around 7:00 o'clock or about 7:00 o'clock in the morning and he detected an odor of smoke. He said he came down the stairs and didn't see any fire on the first floor and went on down to the basement. I do not recall which set of stairs he told me that he had gone down, whether he went down the front steps or the rear steps.

He said when he got down to the basement, the basement was full of smoke, and he could see a colored man standing in the smoke. He asked the colored man what the so-and-so he was doing in there, he says, and with that the colored man came at him with a long shiny dagger. He said he wasn't sure but he thinks he turned on the bathroom light. There was a bathroom in the basement, and he says he thinks he turned on the bathroom light, but he was not sure. He says after the struggle, the colored man stabbed him in the chest and left the dagger to the hilt in his chest and then left.

He don't know how he got out of the house, and he de-[342] scribed this colored man. He told me the man was about 6 foot, real dark-skinned, between 200 and 225 pounds and bald on top, he said, a bald head. He did not know where the man went. He didn't see him any more.

Q. Did he say anything else?

A. He said the next thing he knew, the firemen were in there.

Q. Then what did he say?

A. Well, that is about all I talked to him about at the hospital at that particular time.

Q. How long did you talk to him at that time at the hospital?

A. Oh, I don't exactly recall. I don't think it was over 15 minutes, probably a little bit more, probably less.

Q. At the time you talked to the defendant, what was his physical condition as far as you could ascertain?

A. Well, he talked good. I did observe he had two marks, one on either side of his throat or his neck, rather (indicating). He had several marks on his chest right in here (indicating), in this area. They were bleeding a little, but they didn't seem to be too bad, I don't know.

Mr. Ford: Your Honor, I don't know what too bad is. If it means that if it is real bad it is fatal, and if it isn't fatal——

The Court: You may cross examine on that point to see [343] what he meant.

By Mr. Flannery:

Q. Did he appear to be burned; did you see any burns on him?

A. I didn't see any burns on him.

Q. While he was talking to you, did he appear to be able to see you?

A. Yes, sir, his eyes were open.

Q. Did he appear to be in any acute distress as far as you would ascertain at the time you were talking to him?

A. No. He appeared to be—he was lying quietly on this table.

Q. Lying quietly?

A. Yes, sir.

Q. During the time that you questioned him, was there a doctor in attendance on him pumping oxygen into him or shooting anything into his veins?

A. No, sir, there was no one in the room. Someone kept coming in and going out. I didn't pay any attention to them.

Q. In other words, he lay there quietly and talked to you for about 10 or 15 minutes?

A. That is correct.

Mr. Flannery: Your witness.

By Mr. Ford:

Q. Now didn't you testify at first that as you were in the [344] room, doctors and nurses came in and out?

A. Came in and out, yes, sir.

Q. All right, now, how many doctors came in while you were there?

A. I don't recall.

Q. Give us your best estimate.

A. The only one I can recall is a doctor by the name of Eilberg, I believe.

Q. Eilberg?

A. Eilberg. I think it is E-i-l-b-e-r-g.

Q. Let me get that again.

A. E-i-l-b-e-r-g. That may not be the correct spelling.

Q. But the name sounds right; right?

A. That is correct.

Q. Is he the only doctor you saw there?

Now I understood you to say you were in there 15 minutes.

A. Approximately that time.

Q. Is he the only one doctor that you saw come in and out?

A. I do not remember all the doctors that were there. There were several of them outside of this room. There is a nurses' table, and there were several doctors around there.

Q. But the only ones I want to talk about are those that came in the room, not the doctors who may be in any other [345] place in the hospital.

A. I don't recall how many came back to that room.

Q. Would you say as many as five came in and out of this same room you were in during the 15 minutes you were there?

A. I wouldn't know whether one came in five times or whether there were different ones.

Q. How many times would you say that a doctor appeared, approximately, in that room during the 15 minutes you were there?

A. I don't remember that, sir.

Q. Would you say more than five?

A. I wouldn't say that. I don't remember that. I wouldn't say it truthfully.

Q. What did the doctor do in that room? Were there any other patients in the room?

A. No, sir, not in this room.

Q. All right, now, when the doctor came in, no matter how many times he came in, or how many doctors, what did they do?

A. Well, some of them, as I recall—there is a medicine chest on the wall. They would go to the medicine chest, then go on out again.

Q. And they had nothing to do with Mr. Green?

A. I don't recall whether any of them came right up to [346] Mr. Green or not.

Q. For instance, at the time you looked at Mr. Green, you described some wounds here on his stomach (indicating).

A. Yes.

Q. Were they exposed or by that time were they covered with bandages.

A. They were exposed.

Q. So there were no bandages on him at all?

A. No, sir.

Q. Now as to the other places that you saw on Mr. Green, did they show no bandages on any of them at this time that you are talking to him?

A. No, sir.

Q. So that if he had bandages on, they were put on after you talked to him; right?

A. That is correct.

Q. Did you see any medication on any of the wounds?

A. I do not recall seeing anything, no, sir.

Q. So that as far as you recollect; on these wounds, you didn't see any medication at the time you were talking to him and you saw no bandages?

A. No, sir.

Q. Were you there when doctors in Emergency put medication on these wounds?

A. No, sir.

[347] Q. Were you there when doctors or nurses put bandages on any of these wounds?

A. No, sir.

Q. So that as far as you know, the wounds that you saw during the time you talked to him had never even been treated yet by any doctor?

A. I don't believe they had, no, sir.

Q. Did you see any doctors probe the wounds to see the depth of them?

A. No, sir.

Q. And as far as you know, that hadn't been done; right?

A. I do not know whether it had been done or not.

Q. What time was it when you arrived at the scene of the fire?

A. It was, as near as I can remember, between 8:30 or 8:15 to 8:30, sometime in between.

Q. A. M. of the 26th?

A. Of the 26th.

Q. And that within half an hour, you were at Emergency Hospital to see Mr. Green; is that right?

A. Yes, sir, less than that, I believe.

Q. Now during your talk with him, he was laying on his back, was he not?

A. Yes, sir.

Q. What was he laying on?

[348] A. Well, it was this examining table they have in the emergency room.

Q. That is where they take the patients in emergency cases, accidents, where they are injured; right?

A. Yes, sir.

Q. And that is the table they use; right?

A. Yes, sir.

Q. He was laying on his back, was he?

A. Yes, sir.

Q. Now you went up to him at this time, to wit, 8:30, and got a look at his eyes. What did his eyes look like?

A. I didn't pay any special attention at the eyes. All I know is that he looked at me.

Q. So that as far as you say now, you did not pay any particular attention to his eyes; right?

A. What I mean, I didn't notice anything unusual about his eyes.

Q. Didn't they look inflammed at all?

A. I don't recall. I didn't make any note of that.

Q. Did they look like they were running, like, say, from some smoke that affected his eyes?

A. They could have been, but I don't recall that.

Q. Did his eyes look real clear to you?

A. I can't say, sir, I don't recall.

Q. Now if you can't say that about his eyes, how were you [349] able to answer his question when he asked you was he clearly looking at you and you said yes? How could you answer that, in view of what you have now told me, sir?

A. I say, he didn't answer me with his eyes closed. He looked at me when he answered. Every question I asked, he was looking at me.

Q. Would you say he was staring at you?

A. No, I wouldn't say that; just like an ordinary conversation.

Q. An ordinary conversation? I am talking about his eyes.

A. That is what I mean, when you are talking to someone.

Q. Like I am looking at you now?

A. Well, he couldn't be staring like you are at me right now.

Q. How can you tell the difference? I did that deliberately. So you can tell when someone is staring at you as you just have done it this distance?

A. Yes, sir.

Q. At the time you were talking to him, you were right up close beside him, weren't you?

A. Right alongside him, yes, sir.

Q. Describe the wounds in his neck as you were right there beside him looking at him which did not have any bandages or medication at the time you were talking to him.

[350] A. Well, they looked to be like—well, I have to say pick wounds. They were one on either side of his neck.

Q. Do you think an ice pick could make a wound like that?

A. Yes, sir.

Q. How about his stomach?

A. They looked the same.

Q. Did you see any blood on him?

A. Yes, sir.

Q. Where did you see the blood?

A. The blood was in an area around his chest (indicating). There were little drops of blood on either side on his neck (indicating).

Q. And by little drops of blood, you mean oozing drops of blood?

A. Probably, yes, sir.

Q. Now you say when you first went in there, and I am quoting you directly, if I may, and correct me if I am wrong, when Mr. Flannery was asking you a question, you said you first asked him his name; is that right?

A. Yes, sir.

Q. What did he say?

A. He gave me his name.

Q. And then what was the second thing you said to him?

A. Well, as near as I can remember, I asked him what [351] happened.

Q. So that was the second thing you did. Do you recall

the third thing you said to him? I take it between the second and third, he gave you this conversation you had?

A. Yes, sir, he talked quite a while there.

Q. And before you asked him the third thing, did you display any evidence to him at all, any objects?

A. No, sir.

Q. And then after he gave this explanation, what was the next thing you said to him?

A. I don't exactly recall the last thing I told him.

Q. No, I don't mean the last; I said the next.

A. The next. Well, I couldn't tell you in sequence how he explained.

Q. Have you told us now substantially everything that you told him during the 10 minutes you were there?

A. Well, when I first come in the room, I told him who I was.

Q. Oh, well now, then, wait a minute. Was that the first thing you said to him, then?

A. I can't recall that.

Q. Didn't you testify to him and to me that the first thing you said, and you used the word first, f-i-r-s-t, was to ask him his name?

A. I believe so.

[352] Q. And didn't you tell use the second thing you told him, s-e-c-o-n-d, was tell me what happened and then he told you his version of it?

A. I don't recall the exact words I used.

Q. No, I didn't ask you for the exact words. We are not concerned with the exact words. We are concerned now with first, second, the sequence of the things you said to him. Of course, I am going to get to ask you the question why didn't you identify yourself and say you are a policeman before you asked him his name and before you asked him to tell what happened.

A. Well, I didn't know when I went in there if he was the man involved in the fire or not.

Q. Okay. When you came to the hospital—you are now coming into the hospital—you went toward the emergency room, didn't you?

A. That is right.

Q. You have been there many times; right?

A. Many times.

Q. How did you happen to go to this man who was in a room there laying down?

A. I asked where Mr. Green was.

Q. Right. Now at the time you asked for Mr. Green, you knew who you were looking for, the Mr. Green that was taken from that fire in the house at Massachusetts [353] Avenue; right?

A. Yes, sir.

Q. And they told you?

A. I don't know who told me.

Q. Whoever it was, someone told you in that room; right?

A. Yes.

Q. So that as you walked in, you knew that that was the Mr. Green, because you had just been told it; right?

A. That is right.

Q. Now my question is: Why didn't you tell him I am a policeman, first?

A. I don't recall whether I told him I was an officer first or asked him his name first. I asked, "Mr. Green, what is your full name?" and then I told him, "I'm Sergeant Couture from the Homicide Squad."

Q. So that at this time now, would you want to change the statement you made to Mr. Flannery and to me before that the first thing you said to him was what is your name? It could have been that you said what, that I'm a policeman and you didn't say first what is your name?

A. No, I asked him who he was first, what his name was first.

Q. Then you told us the second thing you did is tell us about the fire. Why didn't you at that time tell him who you were, a police officer?

[354] A. I told him right at the beginning that I was a police officer before he ever explained anything about the fire.

Q. So then if you did it at the beginning, you now say that is the first thing you said to him?

A. I don't know whether I asked him his name first, whether I gave him my name or who I was first.

Q. Well now, you said you are sure of that at the beginning. Now the beginning means first; there is nothing ahead of beginning, is there?

When did you show him at any time your badge, or did you?

A. I don't recall showing him my badge.

Q. Well, don't you in these cases when you go to examine a man carry a badge; all detectives carry a badge, and don't you take it and say my name is so and so, I'm a policeman or something?

A. When I went to Emergency Hospital, I didn't know anything about the facts of the fire. I went to see Mr. Green to find out what happened. I didn't know him, didn't know what had happened at all, and there was no reason to tell him I was a policeman, because I didn't know what he was going to tell me.

Q. All right, if you felt there was no reason to tell him you're a policeman and you didn't tell him, just let's estab-
[355] lish that.

A. No, I told him who I was, but at the time I went in there——

Q. By the way, did you ever tell him. Now, Mr. Green, I am going to ask you a few questions and I want you to know that any answers you may give me may or may not, as the case may be, be used against you; did you tell him that?

A. No, sir.

Q. Did you at any time tell him what his rights may be?

A. No, sir.

Q. During the 15 minutes that you were there, you say nobody attended any of his wounds and there was no evidence that he had been attended to?

A. Not that I can recall.

Q. And you say that condition existed between 8:30 and 8:45?

A. I don't know whether I left there before 8:45 or not; I may have been gone from there. I think I was back in the hospital about 10:00 o'clock that same morning.

Q. Now you also told us that there were some nurses coming in and out of the room while you were there talking to him. How many?

A. I don't recall who was on duty or how many were on duty at the time.

Q. Of course, all the nurses would be on duty. I was
[356] not asking you who was on duty. I was asking you who were the nurses that came in and out of that particular room, because that is the only part of the hospital we are concerned with now.

A. I don't know. I can't remember who was on duty.

Q. Would you say there many or few?

A. That I can't say.

Q. And did any of the nurses come over to this man who was there, Mr. Green, laying on the bed?

A. They may have, yes, sir.

Q. You say they may have. Did you see them do anything, administer to him or give him a drink of water or any medication on his wounds or carry any bandages of any kind?

A. That I can't recall.

Q. So that as far as your recollection, therefore, is concerned now, they could have been attending to him while——

A. Not while I was talking to him, no, sir, they were not.

Q. Then you do recall that they did not do these things while you were talking to him?

A. Not while I was talking to him, no, sir.

Q. What did they do when the nurses came in the room, in addition to these doctors, during these 15 minutes?

A. I don't know what they did.

Q. Did you see what they did?

[357] A. No, sir. I wasn't paying any attention to them. I was talking to Mr. Green.

Q. But you were paying attention enough to know they were persons and that they were nurses and they were doctors and that they came in and they went out, even though you were talking to Mr. Green; right?

A. That is right.

Q. And at no time did they come up or say anything to Mr. Green or in any way attend to him while you were there?

A. Not for the few minutes that I talked to him.

Q. Now when you were going in to see him, were you concerned with whether or not he was in a physical or mental shape for you to talk to when you went in the room at 8:30?

A. I didn't ask anybody whether he was able to or was in condition to talk to. When I asked his name and he gave me his name, I assumed that he was in condition to talk.

Q. In other words, the fact that they gave you his name, you assumed from that he was in condition to talk?

A. The fact that he gave me his name.

Q. I am talking about before you went into the room.

A. I did not ask.

Q. Did you look at the card they made out there at the desk and see what it was that they had him in there for?

A. No, sir.

Q. Didn't you know then that he had been taken there [358] within one hour of your seeing him suffering from the inhalation of smoke?

A. That is possible. I didn't know about it at the time.

Q. Well, let's see. Who did you get the name from at the scene?

A. I am not sure, but I think it was from Mr. Kelly, but I am not too sure.

Q. The fire inspector; right?

A. Yes, sir.

Q. What was the conversation you had with Kelly right then?

A. Just as we arrived on the scene, Sergeant Clarke and myself got out of the car and we were met in the yard by Mr. Kelly, and he told us at that time that one of the persons that lived in the building had been pronounced, and another one by the name of Green had gone to the hospital, and that was all I knew about it.

Q. Now when Kelly told you he went to the hospital you knew that they wouldn't be taking him to a hospital unless he needed hospitalization, didn't you?

A. Well, that is generally the reason, yes, sir.

Q. And did you see the blood on his chest and on his neck as soon as you walked up to where he was and before you asked him to tell you what happened; did you actually [359] see those things?

A. Yes, sir.

Q. And did you actually see the blood on him at the time just prior to the time you are asking him to tell you what happened; you saw that blood on him?

A. I did.

Q. And didn't you believe that that was blood coming from his body or did come from his body, that he was in some way injured; didn't the blood indicate that to you?

A. That he had been injured?

Q. Yes.

A. Yes, sir.

Q. And you knew that he was carried there just an hour before, didn't you?

A. Yes, sir.

Mr. FORD: I have no further questions.

Mr. FLANNERY: Your Honor, I might as well point to another matter. This officer came back at 10:00 o'clock that same day and talked to this defendant again——

Mr. FORD: We challenge that, Your Honor, too, if it is within two hours of the occurrence.

Mr. FLANNERY: —along with Sergeant Clarke.

Would Your Honor like me to go into that?

The COURT: Yes, let us hear what he has to say about that.

[360] By Mr. FLANNERY:

Q. Now then, after you asked this defendant as you have testified, around 8:30 or so that morning, where did you go from there?

A. I returned to the scene of the fire.

Q. And at the scene of the fire did you gain certain information?

A. That I did.

Q. And armed with that information, did you have occasion to return to Emergency Hospital?

A. Yes, sir.

Q. Did you return with someone?

A. Yes, sir, with Sergeant Clarke.

Q. Of the Homicide Squad?

A. Yes, sir.

Q. What time did you go back to Emergency Hospital?

A. It was about 10:00 o'clock.

Q. When you went back to Emergency Hospital, did you see——

Mr. FORD: May I interrupt you a minute to get something clear? Did I understand that Sergeant Clarke was with him on the first time also?

Mr. FLANNERY: No, the second time.

Mr. FORD: So that he was by himself on his first occasion of 8:30?

[361] The WITNESS: That is correct.

Mr. FORD: I just wanted to clear it up.

By Mr. FLANNERY:

Q. The second time, Sergeant Clarke was with you and you arrived at the hospital about 10:00 o'clock?

A. About 10:00 o'clock, yes, sir.

Q. Where did you talk to Green that time?

A. He was in the same room.

Q. Was he still laying down there?

A. He was.

Q. What was his physical condition at that time as far as you could ascertain?

A. Well, it seemed to be about the same. He talked good.

Q. He talked good?

A. And he was lying on his back.

Q. Lying on his back?

A. Yes, sir.

The COURT: Was he in custody at that time?

The WITNESS: There were no officers there, no, sir, just myself and Sergeant Clarke.

By Mr. FLANNERY:

Q. Did you have additional information this time when you went back in connection with this fire?

A. Yes, sir.

[362] Q. Will you please relate what you said to the defendant and what Sergeant Clarke said in your presence so far as you can remember and what the defendant said to you?

A. Well, first, as I recall, asked him about five different fires that had been found by the firemen, and he said he didn't know about that. I asked him who removed the one-inch plug from the gas main, and he says the nigger must have done it.

Q. What else?

A. Also, I asked him—

Mr. FORD: Just a minute. Your Honor, may we approach the bench? I think it is good for me to do it at this time.

(At the bench:)

Mr. FORD: I have no objection to the expression, nigger, as he is using it now. However, we will object to him using it in front of the jury, which has several colored people on it,

because it would do nothing except possibly raise any prejudice of some kind by the use of that term of derogation, which we want to avoid. I just want to make the observation now, in that there are five or six people—

The COURT: He has to tell what he heard. He can't change that.

Mr. FORD: I understand. I believe certain conversations can be eliminated without the requirement that all of it [363] comes in, and that is what that would do. I know what that term will do. It is a pretty bad term of derogation, and we have at least five colored people on this jury.

Mr. FLANNERY: It is unfortunate, because accidentally the remark might harm the defendant, but if he said it, it is just too bad. It is evidence in the case.

Mr. FORD: But the most important thing, most superior to every consideration, is the fact that the jury bring in a verdict which is in no way prejudiced by any feeling. That is far superior to the police or anything. Where there is a conflict of those two things, that principle must survive; one must give way, and the surviving principle is that they should never, any jury, for us or against us, it makes no difference, bring in a verdict prejudiced by any feeling.

Mr. FLANNERY: I don't want to see this fellow prejudiced, but it seems to me it is evidence in the case, Your Honor.

Mr. FORD: Now I will tell you, in addition, why. Mr. Blow has just shown me, on Page 171 of the official record of this trial had before Judge McLaughlin February 9 and 10, 1954, this witness did not say he used the word nigger, but, on the contrary, he said, "He says that the colored man must have set them." So that at his previous testimony, he used the word colored and not the word nigger. And that is an official transcript.

[364] Mr. FLANNERY: He said he heard it. I don't know what he heard. I wasn't there. I don't want to see the defendant prejudiced, either.

Mr. FORD: I know you don't.

Mr. FLANNERY: I want to give him a fair trial.

Mr. FORD: But there it is. There is the official transcript.

Mr. FLANNERY: My recollection is that down at the morgue that offensive word was used. This is the testimony at the last trial.

Mr. FORD: No doubt about it.

Mr. FLANNERY: But at the morgue, I think something along those lines was said.

The COURT: Well, all I can say is he will have to tell what he heard. He can't tell anything else except what he did hear.

Mr. FORD: I agree, and that is what he was doing here on Page 171.

The COURT: Perhaps, Mr. Flannery, it might be well to tell him that at the other hearing he used the term colored man.

Mr. FORD: And at the morgue, Your Honor, I have the testimony at the morgue, which shows the word he used was colored man at the morgue.

The COURT: Is it agreeable with counsel for the defend-
[365] ant that Mr. Flannery tell the witness that he had heretofore used the term colored man?

Mr. FORD: Yes, Your Honor, it certainly is.

The COURT: Then I suggest you do that.

Mr. FORD: What he repeats to Mr. Flannery is that his recollection is that he did use the word nigger. Therefore, we have nothing to say about it at all; we withdraw our request, but I will certainly use these sworn statements on him. So we withdraw it, Your Honor.

The COURT: You would ask in substance or something like that.

(In open court:)

By Mr. FLANNERY:

Q. Let's see, I believe we reached a point in your testimony where you said that you and Sergeant Clarke had gone back to Emergency Hospital about 10:00 o'clock.

A. That is right.

Q. Now proceed with what you say that this defendant said in connection with this incident.

A. We asked him if on his way downstairs from the second floor he stopped on the first floor and warned Miss Brown about there being a fire in the basement, and he said no. Also at Emergency Hospital, on the floor alongside of this examining table he was lying on, there was an undershirt. We picked up the undershirt and looked to see if there were any holes in it made by any instrument, and there was
[366] none. And we asked Mr. Green how he could explain

the wounds in his chest when the undershirt would naturally cover it. The undershirt had been cut to one side when it was taken off of him. And he didn't explain that.

Q. Was there any other questioning there at that time or does that cover it?

A. Well, Sergeant Clarke asked him several other questions there that I just can not recall.

Q. Did he ask about the ice pick and the wrench?

A. Yes, Sergeant Clarke asked him about that.

Q. Did he ask about some stationery?

A. Yes, there were some remarks made about stationery.

Q. What was that?

A. In regards to had he been writing any letters.

Q. What did he say?

A. He said no, he had not.

Q. At the time that you and Sergeant Clarke talked to him, had you taken him or Sergeant Clarke taken him into custody?

A. I don't recall whether the policeman had arrived at that time or not.

Q. Were there any other policemen there at the time you started to talk to him until the time you concluded this interview?

[367] A. I believe Sergeant Clarke and myself were the only two officers in the hospital at the time.

Q. When you left, what time was it?

A. I don't know how long we were there that time. I don't remember how long we were at the hospital.

Q. When you left the hospital, did you leave any instructions relative to him being taken in custody or transferred to the strong room at Gallinger?

A. Not to be transferred; we didn't know whether he would be admitted or not, but if he was to be admitted to the hospital, we requested No. 3 to place a guard on him.

Mr. FLANNERY: Your witness.

By Mr. FORD:

Q. Who decided that he be transferred to a hospital rather than a precinct or the jail?

A. I believe that would be the doctors at Emergency.

Q. And they had him transferred to a hospital rather than to send him to jail because he was a person who physically needed medical attention?

Mr. FLANNERY: He wouldn't know that.
The COURT: Sustained.

By Mr. FORD:

Q. Were you there at the time?
A. No, sir, I was not.
Q. Now you have no feeling against Mr. Green, have you?
[368] A. No, sir.
Q. In any way.
And you have no feeling that would prompt you to use any particular type of words that might be injurious to Mr. Green in front of a jury which contains some colored people, would you?
A. No, sir.
Q. Now when you testified here, you said that Mr. Green, in answer to your question, said it must have been a nigger.
A. It must have been the.
Q. How?
A. The, the nigger.
Q. The nigger. And the word I direct your attention to is n-i-g-g-e-r.
Now you remember testifying down at the morgue, don't you?
A. Yes, sir.
Q. And you testified under oath, didn't you?
A. Yes, sir.
Q. And did you use your notes down there, either to refresh your recollection, while you were testifying, or not?
A. I do not recall. It was just a couple days after the incident happened.
Q. Now two years have transpired since this occurrence.
[369-374] A. Yes, sir.
Q. And you testified down there under oath on May 28, 1953, didn't you?
A. Yes, sir.
Q. Now that is but two days after you had the conversation with him. Now would you say your recollection was better at that time, on May 28, 1953, than it now is, two years later?
A. It was.
Q. And I will ask you whether or not under oath down at the hearing at the morgue you stated as follows, and I am reading from Page 46:

"He stated he went on down to the basement and when he got into the basement, he said the smoke was thicker down there, and he made out the form of a colored man."

A. That is what I said, yes, sir.

The COURT: Are you reading about the intreview at 8:15 to 8:45 in that?

Mr. FORD: Your Honor, I will just check that.

This is the 8:30 interview.

The COURT: Yes. We have been inquiring now about the interview at 10:00 o'clock.

Mr. FORD: I want to show that it is consistent throughout this one, and I am going right through the next one in one minute, Your Honor.

* * * * *

[375] By Mr. FORD:

Q. Now you came back at, I think you said, around 10:30 that same morning, wasn't it?

A. Yes, sir.

Q. That would be approximately an hour and a half?

A. It was about 10:00 o'clock, I believe.

Q. 10:00. That would make it approximately, say, an hour and fifteen minutes after your first visit that you came back to Emergency; right?

Now when you came back, Green was still in the emergency room, wasn't he? He wasn't taken to a room for patients; he was in the emergency room, wasn't he?

A. That is correct.

Q. Still there.

And as you walked in, was he still laying on the same furniture that he was laying on when you went there or was he in a bed?

A. No, I believe he was on the same table.

Q. And then how long did you spend in there on this trip, you and Sergeant Clarke?

A. I don't exactly remember how long. We were there some time.

Q. Were there any other patients in that emergency room when he was there on this occasion?

A. I don't recall. There was another table in there, [376] but I don't recall whether there was anyone on there or not.

Q. Were doctors and nurses coming in and out of that room while you were there?

A. I believe so.

Q. Were they in any way attending or assisting Mr. Green or did they approach him, any of the nurses or any of the doctors, at any of the times they came in or out?

A. I don't recall whether they did while we were talking to him.

Q. Now you walked up to him. Did you see on that occassion the wounds in his neck?

A. I did.

Q. Were they in the same condition as you had seen them before or did they have bandages and medication on them at that time?

A. That I can't remember whether he had been treated then or not.

Q. And as to the wounds on his stomach, at that time did you see any bandage on him or any medication on those wounds at that time?

A. I don't recall whether his stomach—whether his chest had been bandaged or not.

Q. So your answer is you don't know; right?

A. I don't know.

Q. Now at this time, did you ask any of those doctors [377] who were coming in and out, or did you look on the records, to see what his physical condition was prior to your——

A. I don't recall making any inquiries about his physical condition.

Q. Oh, by the way, on the first occasion, did you feel capable of determining his physical condition under the circumstances you saw as equally as well as a doctor?

A. No, sir.

Q. Did you have any stationery with you?

A. No, sir. Writing stationery?

Q. Yes. You spoke about some stationery; you had gone back.

A. Oh, the second time?

Q. Yes, the second time.

A. Sergeant Clarke asked him about some stationery.

Q. Yes, that is what I am talking about.

Did you have any with you?

A. No, sir. I don't recall that.
Q. Did you show any of it to him?
A. I don't know.
Q. Were you present when Kennedy said something about the stationery?
A. Kennedy?
Q. Kelly, the fire inspector.

The COURT: You mean Clarke?
[378] Mr. FORD: No, Your Honor. I mean the fire inspector who testified.
Mr. FLANNERY: It has not been demonstrated that the fire inspector was there.
Mr. FORD: He said that they went back—excuse me, that he went back and he received some information about the writing of a letter or stationery, that and some other facts, such as about the plug and that; then when they got that information from the fire inspector, they went back to the hospital to ask him about those new things which they found out, which they did not know at 8:30. Am I right or wrong?
The WITNESS: I did not know. Sergeant Clarke wasn't with me the first time.

By Mr. FORD:

Q. When you left the hospital the first time, did you go back to the scene?
A. That is right.
Q. Did you see Clarke?
A. Yes, sir.
Q. Did you see the fire inspector?
A. Yes, sir.
Q. Did all three of you have a conversation regarding stationery?
A. Not the three of us, no, sir. I didn't know anything about the stationery.
[379] Q. You mean Inspector Kelly didn't say anything to you about the——
A. Not that I recall.
Q. Wait a minute—either to you or in your presence to Sergeant Clarke while you were standing there about any stationery?
A. Yes, he may have done that, but I don't recall. I

don't recall the conversation we had with Mr. Kelly the second time. I talked to Clarke mostly.

Q. Weren't you present after you had left Emergency Hospital, weren't you present—by the way, after you left Emergency Hospital and before you came back at 10:00 o'clock, weren't you present when Clarke and Kelly had a conversation about stationery?

A. I don't recall being present.

Q. At the time you went back to Emergency Hospital the second time, did you have any knowledge of any kind from anyone about any stationery?

A. I heard Sergeant Clarke ask Mr. Green about stationery.

Q. You see, my question was, before you went back there.

A. No.

Q. Before you talked to Green.

A. I don't recall.

[380] Q. During both of your conversations, was the defendant, Green, always in a position where he was laying on his back?

A. Well, I don't recall whether he sat up any time or not. The most I can remember is that he was lying on his back.

Q. So your best recollection is that during both conversations, he at all times was laying on his back; is that right?

A. As I remember.

Q. That is what you are telling us all morning, what you remember, isn't it? You mean, by using that expression now, you want to qualify?

A. No, sir.

Mr. FORD: I have no further questions, Your Honor.

Mr. FLANNERY: I have none, Your Honor.

Mr. FORD: We object to both conversations being admitted in evidence and presented to the jury because of the admitted and non controverted physical facts, and we think it is a matter for the Court, Your Honor, as they have done in some of these cases which they have reversed. They said we decide as a matter of law certain facts, and the Court should rule on it, and we say the time element, No. 1. We have fixed his condition, what he went for. We have the records which he has introduced from Emergency Hospital showing his condition, showing his treat-

ment, the undisputed fact that he has blood, and so far [381] as his testimony is concerned, the additional fact he has questioned him even before he has even received any relief or medication for any of these wounds, because he said there were no bandages, no sign of any medication at the time, he said.

The physical facts that are in this case, including the record of the hospital, show that this person was not in a condition, both physically and mentally, to fully appreciate the giving of a voluntary statement to the officer, and we, for those reasons, think that those conversations of those particular dates should be excluded from the jury's consideration as not being purely voluntary.

The COURT: The motion is denied. The Court thinks the jury should hear the evidence and weigh it in connection with all other facts and circumstances shown in the case and determine whether or not the statements were made and, if made, whether they were voluntary in character.

Mr. FORD: Your Honor, I overlooked one question, and I am not doing this now that Your Honor has given his decision.

The COURT: No, that is all right.

By Mr. FORD:

Q. I understood you to say that when you went back there at 10:00 o'clock, that he was not in police custody because there was no policeman there; right? Is that correct?

[382] A. That is right.

Q. That he was not in police custody when you went there at 10:00 o'clock to Emergency Hospital, the second visit; is that right?

A. That is right.

Q. And I also understand that you said that at the 8:30 visit, you called No. 3 and asked them to send a policeman, and so that within that hour and a half—did you tell them what you wanted them to send him for, that you wanted a man taken into custody or guarded in relation to a fire and a death?

A. Yes, sir.

Q. And they didn't send a policeman in that hour and a half, from 8:30 to 10:00, to guard him?

A. They did not.

The COURT: Gentlemen, we will take a recess for 10 minutes and then call the jury back.

(Whereupon, a short recess was taken.)

(At this point, the jurors returned to the courtroom, and the following proceedings were had in the presence of the jury:)

Thereupon——

LIONEL COUTURE resumed the witness stand, and having previously been duly sworn, was examined and testified further as follows:

[383] DIRECT EXAMINATION (resumed)

By Mr. FLANNERY:

Q. Sergeant Couture, in connection with your duties as a member of the Homicide Squad of the Metropolitan Police Department, did you on May 26, 1953 have occasion to go to premises 1115 Massachusetts Avenue, Northwest?

A. I did.

Q. What time did you arrive there?

A. Sometime between 8:30 and 8:45, in the A. M.

Q. Was that at 1115 Massachusetts Avenue, Northwest?

A. That is right.

Q. A. M. or P. M.?

A. A. M.

Q. With whom did you go to the premises?

A. I went there with Sergeant Clarke.

Q. When you arrived there, what did you do; no conversation with anyone, but what did you do?

A. I observed an ambulance litter on the lawn, and there was the body of a white woman there; I could see her head; she was covered, and after receiving information, I left there.

Q. Where did you go when you left there?

A. I went to Emergency Hospital.

Q. What time did you arrive at Emergency Hospital?

A. Well, it was just shortly before 9:00, between 8:45 and 9:00.

[384] Q. When you arrived at Emergency Hospital, to what part of the hospital did you go?

A. I went to the emergency room.

Q. If you recall, where is that in Emergency Hospital?

A. As you come in the front door, the emergency room is back about middleway and to your right is the emergency room.

Q. When you arrived in the emergency room, did you see the defendant in this case, Green?

A. He wasn't in the emergency room. He was in what you call an examining room, a little bit to one side of the emergency room.

Q. When you saw Green, the defendant in this case, what was he doing?

A. He was lying on an examining table in one of the examining rooms.

Q. Was anyone else in the room at that time?

A. Not when I went in.

Q. Did you observe Green as to his physical condition?

A. Well, he was conscious and he talked to me.

Q. Did you see any wounds on his person?

A. I did.

Q. What did you see?

A. There was a wound on either side of his neck (indicating), and there were several wounds in his chest (indi-
[385] cating), in an area around his chest, right around his chest bone.

Q. What did you say when you went in there; what did you say to Green?

A. I asked him what his name was.

Q. What did he say to you in response to that?

A. He told me Everett D. Green.

Q. Did you identify yourself?

A. I told him I was from the Homicide Squad.

Q. At that time when you went there, did you know any of the facts and circumstances surrounding what had occurred at 1115 Massachusetts Avenue, Northwest?

A. The only thing I knew was that someone had perished in the fire.

Q. Did you then question the defendant Green relative to this fire?

A. I did.

Q. Will you please relate to His Honor and to the jury the substance of that questioning?

A. I asked Mr. Green what had occurred, and he told me that he had went to bed about midnight the night before, and he woke up around 7:00 o'clock, and when he woke up, he detected an odor of smoke. He said he went down the stairs. He did not stop at the first floor, where Miss Brown was sleeping off to one room, but he went on down [386] to the basement. He said when he got in the basement, it was full of smoke, and he thinks he went to the bathroom and turned on the light; he wasn't sure, but he said he thought he turned on the light in the bathroom. He saw the form of a colored man standing in the smoke. He asked the man what he was doing, and the man came after him with a long dagger. He said the man stabbed him twice in the neck and in the chest several times. He said then he broke away and he disappeared in the smoke, and he didn't know where he went to or how he got out of the house. He said the next thing he knew, the firemen were taking him out of the house or the firemen were in the house.

I asked him to describe this colored man, and he told me he was about six foot tall, real dark-skinned, with a shiny bald head, and he weighed about 200 to 225 pounds and had on work clothes.

Q. Is that the substance of what he told you at that time?

A. I asked him some questions about Miss Brown, who her relatives were, and questions pertaining to Miss Brown.

Q. Then what did he say in regard to that?

A. Well, he said that she had a niece or nephew, I do not recall exactly what, in Fredericksburg, Virginia, that we could notify them of her death.

Q. What did you do after that?

A. I returned back to the scene and I picked up Sergeant [387] Clarke and got together with him.

Q. Now don't relate any conversation you might have had with Sergeant Clarke or anyone else, but on returning to the scene, did you gain certain information which you did not have when you went to Emergency Hospital the first time?

A. I did.

Q. Now after you received that additional information,

did there come a time when you went to Emergency Hospital again?

A. Yes, sir.

Q. With whom did you go?

A. I went with Sergeant Clarke.

Q. What time did you arrive at Emergency Hospital the second time?

A. It was right pretty near 10:00 o'clock, just a few minutes before or after, I am not sure, but right near 10:00 o'clock a. m.

Q. And Sergeant Clarke was with you?

A. Yes, sir.

Q. At that time, to what part of the hospital did you go?

A. We went back to the same room where I had left Mr. Green previously.

Q. What was Mr. Green doing at that time around 10:00 o'clock?

[388] A. He was still lying on this table, lying on his back.

Q. Now you have said 10:00 o'clock. Do you mean A. M.?

A. A. M.

Q. Did you have a conversation with Mr. Green at that time at 10:00 o'clock?

A. Yes, sir, we both did, Sergeant Clarke and myself.

Q. Please give, if you will, the substance of that conversation.

A. Well, I asked Mr. Green how he explains the five fires that were found by the firemen about the premises, and he says the colored man must have set them.

Asked him how he explains that firemen and the police had to break in all the doors, that all the doors were accounted for, and he didn't know, he didn't know how the man got out.

Also asked him how he explains a one-inch plug that was found removed from a gas main, and he said the colored man must have done it.

Also there was a shirt lying on the floor alongside of this table where he was lying, and it had been cut to one side, and there were several blood stains on it. I asked Mr. Green how he accounted for no stab wounds over the area over the chest (indicating) in the undershirt, and he didn't explain that.

[389] Q. Did you ask him anything else or did Sergeant Clarke ask him anything else in your presence?

A. Well, he was asked several other questions; I don't recall exactly all what we asked him then.

Q. Do you recall what Sergeant Clarke asked him?

A. Yes. Asked him about some stationery that he had seen. He asked him whether he had written any letters that evening.

Q. What did Green say to that?

A. He said no.

Q. Now, Sergeant Couture, have you given us the substance of that convesation at 10:00 o'clock?

A. Yes, sir.

Q. Now then, directing your attention to the following day, which would be May 27, 1953, did you have occasion to see Lieutenant Bryant of the Metropolitan Police Force on that day?

A. I did.

Q. Without relating any conversation, did anything transpire between you and Lieutenant Bryant?

A. Yes. It was about 10:30, I believe, in the evening, May 27th, that I went to No. 8 Precinct and talked to Lieutenant Bryant, and as a result, I received a letter.

Q. From Lieutenant Bryant?

A. From Lieutenant Bryant.

[390] Q. I will show this envelope and its contents, the envelope being known as Government's Exhibit No. 4 and this piece of paper-writing being known as Government's Exhibit No. 4-A. I will ask you to look at those two exhibits and tell me, is that the letter that you just referred to?

A. That is the letter.

Q. And you identify that how?

A. I wrote my initials in the top left-hand corner of the envelope. I also put detective bureau number on here and my name typed in.

Q. Did you mark——

A. The letter also——

Q. The letter also?

A. —with a number, and I just have my name there.

Mr. Ford: We have already stipulated that the defendant Green wrote that letter.

Mr. Flannery: I know he did.

By Mr. FLANNERY:

Q. Now after you got this letter into your possession, did there come a time subsequent to that when you talked to the defendant Green?

A. Yes, sir.

Q. And when was that?

A. That was about 9:30 a. m., on the morning of the 28th, and that was at D. C. General Hospital in the locked ward.

[391] The COURT: What date was that?

The WITNESS: On the 28th, sir.

By Mr. FLANNERY:

Q. May 28th, 1953?

A. May 28th.

Q. At 9:30 a. m., you say?

A. That is right.

Q. Now who went to the District of Columbia General Hospital with you at that time on that date?

A. Well, at that time, Mr. Kelly from the Fire Marshal's office and Sergeant Clarke were with me.

Q. Did you have this letter, Government Exhibits 4 and 4-A, in your possession at that time?

A. I did.

Q. Did you question the defendant Green at that time?

A. I did.

Q. Will you please relate the substance of what Green told you at that time?

A. Well, he told me that morning that he had written that letter just prior to his detecting the odor of smoke and mailed it.

Q. What else did he tell you?

A. Well, he was questioned again about the five fires and also about the gas plug, and he said the same thing, that he thought the colored man must have done it, and I [392] asked him about some cartridges that I had seen in the front room.

Q. Some cartridges?

A. Bullets. There was a box of .45 calibre cartridges in a dresser drawer on the second floor front bedroom. I asked Mr. Green if he had a gun for that, and he said no. I asked him why he had the shells and he said——

Mr. FORD: We are going to object to this, if Your Honor please, on the very ground that this case does not involve any killing by any guns or any bullets of any kind. It is not that kind of a case.

The COURT: Objection overruled. You may answer.

The WITNESS: He said that before he would let those people get the house, he would blow the so-and-so place up and then blow his brains out; he would get a gun to fit the shells. He said he did not have a gun, but he would buy a gun to fit the shells and blow up this place and then blow his brains out.

By Mr. FLANNERY:

Q. You made reference to an undershirt of the defendant's.

A. Yes, sir.

Q. When did you say had seen that?

A. That was at Emergency Hospital on the floor alongside of the table that Mr. Green was on.

Q. Did you do anything in connection with that undershirt?

[393]

A. Sergeant Clarke put his initials on it and brought it in to the property clerk.

Q. Sergeant Clarke took care of that?

A. That is right.

Mr. FLANNERY: I believe that is all I have.

CROSS EXAMINATION

By Mr. FORD:

Q. Did you testify a few minutes ago that you made a visit to the District General Hospital? Now that is Gallinger Hospital, isn't it, way out on 19th Street, Southeast; right?

A. That is right.

Q. Emergency Hospital you referred to is up on 17th Street and New York Avenue, Northwest; is that right?

A. That is right.

Q. There are miles that separate those two points; they couldn't become confused, could they?

A. That is right.

Q. Did I understand you to say that on the 27th you visited Gallinger?

A. No, sir.

Q. On the 28th?

A. On the 28th.

Q. And who did you say was with you when you visited Gallinger Hospital on the 28th?

[394] A. Sergeant Clarke and——

The COURT: Did he say Gallinger?

The WITNESS: I may have said D. C. General.

Mr. FORD: I think he said Gallinger, now known as District General. There is a change of name between them. I guess we can agree we are talking about the same place.

The COURT: Yes, I think the jury may understand that.

By Mr. FORD:

Q. Okay, there is a change of name. It went from Gallinger to the District General, but it is the same thing.

Did you say who went with you?

A. Sergeant Clarke and Mr. Kelly, from the Fire Marshal's office.

Q. Is Mr. Kelly here?

The COURT: We excused him a while ago.

Mr. FORD: Yes, but I saw him here this morning. He approached me, Your Honor. That is how I happen to know he is here.

The WITNESS: It is the same Mr. Kelly.

Mr. FORD: Wait, you don't need to get him. What I want to know is, that is the fire inspector who testified here; I just want to make sure?

The WITNESS: That is right.

By Mr. FORD:

[395] Q. And you say he went with you and Clarke, and that you and Clarke accompanied him to the General Hospital to what you call—what did you call the room?

A. To the locked ward.

Q. The locked ward; on the 28th?

A. That is right.

Q. And that he, that same Kelly, was with you when you were questioning Mr. Green?

A. He was.

Q. And was Fire Marshal Roberts with you?

A. Not at that time, no, sir.

Q. That is what I am talking about.

A. No, sir.

Q. You are sure of that?

A. I am positive.

Q. Okay.

Now let's go back to the first time when you went to Emergency Hospital. You say you got there about 8:30?

A. Yes, sir.

Q. You walked in the hospital; you are by yourself?

A. Yes, sir.

Q. And you went to the emergency room?

A. That is right.

Q. And this emergency room in the Emergency Hospital is a room where they treat patients who are carried in there who are injured, like from accidents,—just what it means, [396] emergency; right?

A. Exactly.

Q. And then after they get through treating them as best they can, the doctors, they are transferred to what we know as patients' rooms, where you take them up where the patients are to recuperate; right?

A. Well, sometimes. Sometimes they are kept under observation for so many hours in the emergency room and then released directly.

Q. Now at this time you went there to talk to Mr. Green at 8:30 a. m., on May 26th, he at that time was laying on his back, wasn't he?

A. That is right.

Q. And he was on a table; right?

A. Right.

Q. Now that you know to be a treatment table?

A. Examination table I think they call it.

Q. They treat you for gunshot wounds, broken arms, bones and what-not; right? And they treat you there, don't they?

A. Yes, sir.

Q. Now he is in this room, and you recognize that as being that type of a room for that purpose, don't you?

A. Yes, sir.

[397] Q. And as you walked up to him and he is laying on his back, you got close to him to get a look at him, didn't you?

A. Yes, sir.

Q. And as you looked at him—I am talking about before you questioned him now—you saw two wounds here in his neck (indicating), didn't you?

A. I did.

Q. Now at that time that you saw those wounds, they weren't in any way bandaged, were they?

A. No, sir.

Q. And at that time, they didn't have any medication on them at all, did they?

A. I don't recall whether they had any medication or not, but I know they weren't bandaged.

Q. Then he had wounds in his stomach (indicating)?

A. No, sir, they were up here in his chest (indicating).

Q. Excuse me, up here in his chest. You saw those?

A. Yes, sir.

Q. Now they didn't have any bandages on them?

A. No, sir.

Q. And did they have any medication on them?

I am trying to bring out if you got there to question him before or after he was treated. That is what I want to bring out.

[398] A. I didn't see any medication on him.

Q. Right.

And did you see any other wounds?

A. That is all I can remember, is the ones on his chest and on each side of his neck.

Q. How about one back here (indicating), where I am pointing, behind in his neck?

A. I don't recall one back there.

Q. Now, let's take his eyes. Did you see his eyes? Were they red or were they in any way running, which might indicate that smoke had affected them in any way, or were they just clear, for instance, as clear as mine are?

A. I can't remember whether his eyes were running or whether they were bloodshot or not.

Q. Then during this time you say you were questioning him, did doctors come in and out of that room?

A. Yes, sir.

Q. And nurses coming in and out of that room during the time you questioned him?

A. Yes, sir.

Q. Did you ask any doctor, after you had seen these conditions, after you had seen it was the emergency table—did you see any blood on him?

A. There was blood on his chest.

Q. Where did you see the blood?

[399] A. There was blood on his chest (indicating). There was a little blood on either side of his neck (indicating).

Q. You saw those, too, before you questioned him, didn't you?

A. Yes, sir.

Q. Now, knowing that that is an emergency room, as you saw, and having seen the blood and seen these injuries, did you ask any doctor if he was in fit condition to talk to and to give thoughtful and reasonable answers?

A. I did not ask anyone, no, sir.

Q. Anyone, that includes you didn't ask any nurses either; right?

A. I don't recall asking anyone.

Mr. Ford: Do you have those Emergency Hospital records?

By Mr. Ford:

Q. In your experience as a member of the Homicide Squad, you know that when a patient is brought into an emergency room, they have a card or a record they make of what is wrong with him; right?

A. Yes, sir.

Q. And did you go look at that in order to determine whether or not he was fit to talk to at that time or whether you should talk to him later, the next day or that evening?

A. No, I don't recall asking any questions about that.

[400] Q. Then you came back—that was at 8:30—you came back an hour later or about an hour and a half later, which would be about 10:00 o'clock the same day?

A. Yes.

Q. Now when you came in there with Sergeant Clarke, he was still in the emergency room, wasn't he?

A. He was.

Q. And he was still on the same cot that he was when you saw him an hour and a half before?

A. He was.

Q. And did you still see those wounds in his neck and his chest?

A. I don't recall whether they had been covered then or not.

Q. Covered, by that do you mean bandaged?

A. Yes, sir.

Q. Now what is your best recollection?

A. I don't remember in what condition they were the second time I went to the hospital.

Q. So your recollection is, you found the same conditions existing so far as he is concerned, his location and physical as you did at 8:30, an hour and a half before; is that it?

A. Yes, sir.

Q. And you say you found a shirt there?

[401] A. There was a shirt lying on the floor right alongside of the stand he was lying on.

Q. When did you first see that shirt, when you went there at 8:30 or 10:00 o'clock?

A. I don't recall. I didn't pay any attention to it before.

Q. Before what?

A. The first time I went there.

Q. So that as far as the first time is concerned, you didn't see that shirt there?

A. I don't know. I didn't notice it.

Q. My question is, you didn't see it there at 8:30, did you?

A. I don't know whether I did or not. It might have been there all the time.

Q. You don't know whether you saw it or not?

A. Yes, sir.

Q. Then you said that that shirt was slit down the side, did you say?

A. Yes, sir.

Q. Do you mean from top to bottom?

A. That is right.

Q. So that it would unfold?

A. Right.

Q. Is that right?

[402] A. Yes.

Q. What did you ask him about that?

A. Why?

Q. No. What, if anything, did you ask him? You were looking at his shirt, and it is cut now down from top to

bottom. You are right there in the emergency room; Green is there. What did you ask him about that, about that shirt?

A. I asked him how could he account for no holes being in the chest part of the shirt here where there were holes in his chest, marks in his chest.

Q. What did you ask him about that cut you have been talking about?

A. I didn't ask him about that. I knew what that was.

Q. How did you know it?

A. Because that is a procedure in the hospital: they cut them off when the patient comes in the hospital.

Q. So you are testifying that it was cut and you knew it was cut because of the procedure, you know that they are going to cut it off?

A. To remove it from the patient, yes, sir.

Q. And you also know, do you not, as a custom, that they don't wait, if a patient is carried into that emergency room bleeding and with blood and with wounds that are visible, that they don't wait for an hour to put some medication or give some treatment to them, too, don't you?

[403] A. That is right.

Q. And did you inquire about that?

A. No, sir.

Q. Did you ask Mr. Green before you started questioning him, Are you suffering with any pain, Mr. Green, from any of these wounds?

A. I don't recall asking him anything like that.

Q. You didn't ask him anything about his physical condition, how he felt before you wanted to question him, did you?

A. No, sir.

Q. Then, as I understand you—excuse me if I repeat—you didn't know what they had written on his record?

A. No, sir.

Q. Did you know that he had been carried unconscious from Massachusetts Avenue just three-quarters of an hour before you had questioned him in that hospital; did you know that?

A. No, sir.

Q. And no one at the scene had told you?

A. No, sir.

Q. And yet it was at the scene that you found it was his name and that there was a man carried away to Emergency Hospital?

A. Yes, sir.

Q. But in telling you that he had been carried away, they [404] didn't tell you that he was unconscious?

A. They did not.

Q. Do you recall testifying on direct and making the following statement: Asked him about stationery he had seen''? Do you remember making that statement?

A. Well, I will put it this way. One of us asked him; I don't know whether it was myself or Sergeant Clarke.

Q. Okay. But is that what it was, asked him—you see, I am not saying who—asked him about stationery he had seen? Do you remember making that statement right here?

A. Yes. Sergeant Clarke asked that question, or had seen the stationery.

Q. What I am getting at is what you meant by he had seen the stationery.

A. That would be Sergeant Clarke had seen the stationery.

Q. That means at 10:00 o'clock, on May 26th, Sergeant Clarke, in Emergency Hospital, had made a statement to him that he, Sergeant Clarke, had seen stationery?

A. That is correct.

Q. Is that right?

A. That is right.

Q. Now when you went down with the fire inspector and Clarke to the room that you have described at the District General Hospital or Gallinger, where was Green in this room [405] and how did you get in there?

A. You have to be let in by an officer. There is an officer standing guard outside, and he lets you in the room.

Q. Did he do that on this occasion?

A. Yes, sir.

Q. And you and, you say, the fire inspector went in there?

A. That is right.

Q. Where was Green?

A. As I recall, he was on the last cot on the right-hand side of the room near the window; that would be to the farthest back in the room.

Q. In what position was he on the cot?

A. I think he was standing alongside the cot, along against the cot.

Q. When you say Green was standing, you don't mean

sitting on the side of the bed now—wait a minute, will you let me finish?

Mr. Flannery: Wait until he finishes his answer.

The Court: Finish your question.

By Mr. Ford:

Q. You do not mean that he was standing on the floor beside the bed; which do you mean now, you tell us?

A. He was standing on the floor and with his back against the bed.

[406] Q. Right, and as he stood with his feet on the floor and the fire inspector was there, was he in that position when you questioned him, standing on the floor with his back to the bed?

A. I don't remember whether he got in bed and laid down or sat on the side of the bed: I do not remember.

Q. You don't know one way or the other?

A. No, sir.

Q. Now this was the third time you had visited Mr. Green——

A. Right.

Q. —to question him and to get answers from him?

A. Yes, sir.

Q. Now, how long have you been on the Homicide Squad, Sergeant?

A. About eight years.

Q. And during that time in performing your duties, how many times would you say you have interviewed persons regarding—I am talking about your official duties now—regarding alleged crime?

A. That would be hard to say, sir.

Q. Well, is it many, let's put it that way?

A. Many, yes.

Q. And after you talk to them and they appear to voluntarily tell you, you take it down in writing, don't you?

[407] A. Yes, sir.

Q. As a matter of fact, that is done every day; right?

A. Yes, sir.

Q. And it is typed up in a statement, correct, in front of witnesses or police officers or whoever happens to be there, and then you give it to the person and ask him to read it, don't you?

A. That is when a defendant is brought to the office of the Homicide Squad, then a statement is taken from him, yes.

Q. So you mean that you only do it if you take them into the Homicide Squad?

A. No, sir.

Q. You have police officers and clerks that do all this, haven't you, who are provided the Homicide Squad?

A. Yes, sir.

Q. Did you take them down on any one of these three trips that you made and type down what he would say?

A. No, sir.

Q. And then ask him, is this it, and then ask him to sign; did you do that?

A. No, sir, that is never done that way.

Q. What is never done that way?

A. The way you explain it.

Q. To type it and take it down as he states it?

[408] A. Yes, but that is only done when the defendant is in the office of the Homicide Squad and it is taken down in typewritten form as he says it.

Q. So that no statements are taken away from headquarters; is that what you mean?

A. Not by our squad, no, sir.

Q. But your squad is what I am talking about and every member on it. They don't take written statements away from the squad room; is that right?

A. Unless someone is incarcerated in some other jurisdiction.

Q. You know they have done it, don't you, taken statements from witnesses who were not in headquarters? You positively know that that squad has done that many and many a time, do you not?

A. Not in homicide cases.

Q. I am talking about the Homicide Squad, yes, sir.

A. No, I don't recall of any.

Q. You don't recall any, and you have been on there how many years, sir?

A. Almost eight years.

Q. And was the fire inspector there all during this conversation that you had at Gallinger Hospital?

A. All three of us were together, yes, sir.

Q. And at no time was Fire Marshal Roberts there with [409] the fire inspector?

A. He wasn't there with us in the room at that time.

Q. That is what I am asking you about.

A. Not in that room, no, sir.

Q. That is the room I am talking about. I am talking about you and Sergeant Clarke.

A. No, sir.

* * * * *

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[410] ALFRED D. CLARKE, was called as a witness for the Government, and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. FLANNERY:

Q. Sergeant Clarke, please state your name.

A. Alfred D. Clarke.

Q. You are a member of the Metropolitan Police Force, attached to the Homicide Squad, are you not?

[411] A. I am, sir.

Q. Directing your attention to May 26, 1953, were you a member of the Metropolitan Police Force, attached to the Homicide Squad, on that date?

A. I was, sir.

Q. Directing your attention to that date, namely, May 26, 1953, did you have an occasion in connection with your duties to go to premises 1115 Massachusetts Avenue, Northwest, in the District of Columbia?

A. I did.

Q. What time did you go there?

A. Shortly after 8:00 o'clock in the morning. I would say it would be in the neighborhood of approximately 8:15 when I arrived.

Q. Did someone go with you?

A. Sergeant Couture, also of the Homicide Squad.

Q. When you arrived on the scene, what did you see and what did you do?

A. The fire apparatus was on the scene when we arrived. Walked into the front yard, which is a long front

yard, leading into the premises. On the left of the walkway going in I observed a carrier or a litter, and at that time I received the information from Inspector Kelly. I pulled the sheet down and observed the body of an elderly white woman, who at that time had been pronounced dead.

[412] Q. What did you do?

A. I then ordered the body to the D. C. Morgue. With that, I went into the basement premises with Inspector Kelly. Couture left us at this point.

Q. Couture left you?

A. Couture left at that point.

Q. You went in the basement?

A. At the basement door I met Chief Roberts, of the Fire Marshal's office, who handed me a wet towel, a Stiltson wrench and an ice pick.

* * * * *

[413-414] By Mr. FLANNERY:

Q. What did you do next, Sergeant Clarke?

A. As a result of information received at that time, I placed this Stiltson wrench over a one-inch gas plug that was located just inside the basement door and to the left. That Stiltson wrench was set where it exactly fitted this one-inch gas plug.

Q. And where was that gas plug?

A. That was just to the left as you come into the basement entrance.

* * * * *

[415] Q. Then did you have occasion to go in the kitchen at that time?

A. We went to the back portion of the house, and I came into that back portion, as I recall, through the back stairway into the kitchen, and in the kitchen we observed a table which had a cup and saucer set on the table. There was a box of writing paper which, as I recall, had the lid removed from it, a couple pencils and a pair of eyeglasses. There was also a box partly filled with paper matches. There was a pile of paper matches over on the stove. I believe that was a gas stove. That was located on the west side of that kitchen.

[416] Q. What did you do then?

A. Shortly after this examination, Sergeant Couture returned to—no, I first made inquiry around the neighborhood, and it was shortly after that that Sergeant Couture returned to the house, and as a result of information he gave me and that I gave him, we went back to Emergency Hospital. On my arrival at Emergency Hospital, I had a conversation with the defendant.

Q. What time did you arrive at Emergency Hospital?

A. That was sometime after 10:00 o'clock. It was approximately 10:15, 10:30.

Q. To what part in Emergency Hospital did you go?

A. Into the emergency room.

Q. Which was located on what floor of the hospital?

A. That would be to my left; it was on the first floor of the hospital; on the right as you come in the main entrance.

Q. When you entered the emergency room, did you see the defendant in this case, Green?

A. I did. I didn't see him immediately until I got back into what we would term as an operating room.

Q. But there did come a time when you saw him?

A. I did.

Q. When you saw him, where was he and what was he doing?

A. He was on a table, lying on a table, as I recall. When I first observed him, he had a patch through this section of his chest (indicating) that had been covered apparently [417] by the doctors or nurses at the hospital. I saw two small marks, one on either side of his throat (indicating), the type of mark that I would call a puncture wound, just a round hole on each side.

Q. Did you talk to him?

A. I did.

Mr. Ford: At this time, Your Honor, for the record, we make an objection to the conversation which is the 26th at 10:00 o'clock.

The Court: You may proceed. Objection overruled.

By Mr. Flannery:

Q. Did you identify yourself?

A. I did.

Q. Did you ask him some questions?

A. I did.

Q. And did he make some responses?

A. He did.

Q. Will you please give the substance of what you asked him and what he said to you?

A. At first I asked him about this Stiltson wrench and the ice pick. I asked him if these articles belonged to him.

Q. What did he say?

A. He couldn't identify either one. He said he had several Stiltson wrenches and he had two or three ice [418] picks. I asked him about whether or not he had opened the one-inch plug in the basement with the Stiltson wrench. He told me he had not, that the colored man must have.

I asked him about the writing paper that was on the kitchen table, as to whether or not he had written any notes during the evening before or the early morning. He said he had written none.

I also asked him about the United States marshal being at his premises the day before with a notice to set him out. He told me that he had been.

I asked him whether or not he had been to see quite a few people in an effort to borrow several hundred dollars to withhold the setting out. He told me that he had.

That was about the extent, as I recall, of the conversation I had with him at the emergency room.

Q. Did he say anything about his movements during the early morning hours of that day?

A. He told me that he got up somewhere around 7:00 o'clock in the morning. He first told me that he came down the front staircase, and at that time I stopped him and asked him whether or not he had gone into the room of the deceased to call her to get her out of there because he had smelled the smoke at that time. It was then that he changed his story and told me that he went down the back staircase and down into the basement and when he was going down the steps, he observed this tall colored man, [419] heavy-set, with a baldish head, and that this man came at him with a shiny bladed dagger, that he stuck him several times with it and finally left the dagger in him. He himself went into the bathroom, and in an effort to get air, because the smoke was becoming dense, climbed

into the bathtub and turned the water on in the bathtub. I believe he said something about the water later getting hot and he had to cut it off.

Q. Did he say anything else about what he did or what happened after that?

A. I don't recall anything further from then.

Q. Now going back for a moment to the time that you were in the house with Inspector Kelly and the time you were in the kitchen, did you find anything else in the kitchen?

A. A search was made of the kitchen for what we believed to be turpentine, because on entering the premises in the area of the fire, and I also got the same odor in the basement, there was a strong odor to me of turpentine; therefore, we looked for that turpentine, and Inspector Kelly found that bottle of turpentine in a dresser on the east wall of the kitchen.

Q. I will now show you what is known as Government Exhibit No. 5 for identification, a bottle. I will ask you, can you identify it?

A. Yes, sir, I can.

[420] By Mr. FLANNERY:

Q. Now then, Sergeant Clarke, did there come a time subsequent to the time about which you have just testified when you saw the defendant, Green, again?

A. There did.

Q. When was that?

A. On the morning of May 28th.

Q. What time?

A. About 9:30, we arrived there.

Q. Where?

A. At the D. C. General Hospital, in the locked ward.

Q. You say we arrived there. Who do you mean?

A. Inspector Kelly and Detective Sergeant Couture.

[421] Q. Where did you go; was it known as Gallinger General Hospital then?

A. It is the D. C. General Hospital. At that time it was known as Gallinger Hospital.

Q. When you arrived at that hospital, where did you go in the hospital?

A. We went directly to the second floor or to the locked ward.

Q. When you got there, did you see the defendant in this case, Everett Green?

A. I did.

Q. What was he doing when you arrived there?

The COURT: What date was it, Officer?

The WITNESS: This was on May 28th, about 9:30 a. m., when I arrived.

By Mr. FLANNERY:

Q. A. M.?

A. A. M.

Q. All right.

Mr. FORD: We are making no objections to this conversation, Your Honor, on the 28th.

The WITNESS: He was on the fourth bed, which would be the farthest bed on the north wall of the room, and it was at that time after we got there that we started a conversation with him, or Sergeant Couture almost immedi- [422] ately asked him to identify all that he had in his possession.

By Mr. FLANNERY:

Q. Let me interrupt you for a minute. I will show you what has been introduced into evidence as Government's Exhibit Nos. 4 and 4-A, namely, this envelope, which is 4, and this piece of paper writing, 4-A, and ask you, can you identify those?

A. Yes, sir. This is the envelope and the letter that was shown to him.

Q. Will you proceed, please, give the substance of what was said there by the defendant and by you or anyone else in your presence.

A. Mr. Green identified the letter as one which he had written to Mrs. Anthony. In response to a question by me, he gave me the time that he had written this letter as sometime around midnight. And at that time I asked him if the box of writing paper that I had also was his.

Q. You made reference to a box of writing paper. Did there come a time when you took into your possession a certain box of writing paper?

A. On the morning of May 28th.

Q. May 28th?

A. In company of Inspector Kelly.

Q. I will show you what has been marked as Government Exhibit No. 6 for identification, this box and its contents. [423] What is that?

A. This is the box of stationery that I removed from the kitchen table in the premises 1115 Massachusetts Avenue.

Q. Would you open the box a minute?

How do you identify that?

A. I made a notation here at 9:30 a. m., 5/28/53, made statement admitting writing letter.

Q. And you identify the box?

A. And he identified this as his paper.

Mr. FLANNERY: I will offer into evidence at this time, Your Honor, Government Exhibit No. 6 for identification, this box and its contents.

Mr. FORD: No objection.

The COURT: Government's Exhibit No. 6 is received.

(Government's Exhibit No. 6 is received in evidence.)

By Mr. FLANNERY:

Q. Now proceed, if you will, Sergeant Clarke, with the substance of what the defendant said there and you said and the other people with you said in your presence and the presence of the defendant.

A. He was asked about one of the statements in the letter that he had written, "We both want it this way." He was asked, as I recall, by Sergeant Couture in reference to that as to whether or not he and the deceased both knew about [424] this letter, whether or not he had talked this over with her or consulted her about it, and he said at that time that he had not discussed it with her, that she knew nothing of the letter.

Q. Was there anything else said?

A. Later he was asked about some shells, and in reference to those shells, he made the statement that he was going to get a gun to fit the shells and blow the house up and blow his own brains out.

Mr. FLANNERY: Would Your Honor bear with me a moment?

I believe that is all I have of this witness, Your Honor.

CROSS EXAMINATION

By Mr. FORD:

Q. Sergeant, you have testified that on the morning of the 26th, when you arrived, Inspector Kelly of the Fire Department handed you two instruments, to wit, an ice pick and a wrench; is that right?

A. No, sir. That was Fire Marshal Roberts.

Q. Roberts handed it to you?

A. Handed those instruments to me.

Q. And you identified those as being the two instruments?

A. That is correct, sir.

Q. Now did you when they were turned over to you at any [425] time, either yourself or has anyone else in the Police Department examined either one of those instruments for any fingerprints?

A. I did not.

Q. Does the Police Department have available and did have available on that day a laboratory and a division for the taking of pictures of fingerprints on instruments that may be considered evidence of crime?

A. Oh, yes.

Q. Were these instruments, either one or both, on that day or any day since then turned over to them to see if there were any fingerprints on either one of those instruments?

A. They were not.

Q. Now, taking up each instrument by itself. I notice you said that when you got to the hospital and saw the defendant, he had some wounds in his neck (indicating), two?

A. That is correct.

Q. And wounds on his chest?

A. That I didn't see.

Q. You didn't see.

Taking up these wounds that you did see, I think you described them as puncture wounds; correct?

A. That is correct.

Q. Now that is exactly the type of wound that a device like this makes, isn't it, a puncture wound; right?

[426] A. That is correct.

Q. Now when this was turned over to you, this pick, did it have blood on it?

A. It did.

Q. And where was the blood on it?

A. The blood about took in the whole point of the blade.

Q. Would you say it had blood on it up to the hilt?

A. I would.

Q. And by hilt, you mean this part of the instrument, do you not, right there (indicating); correct?

A. Yes, sir.

Q. And that instrument had blood on it, did it not?

A. It did.

Q. From the very point all the way down the whole entire blade up to the point here (indicating) which you referred to as the hilt. There isn't any question about that at all, is there?

A. No, sir.

Q. Now we'll take the next instrument, this wrench. I understood you to say after this wrench was handed to you, you took it and it was in a set position to fit a nut that was in a pipe.

A. It was in the position that it was given to me. I didn't tamper with the setting at all. I was shown a one-inch plug. [427] I took it up to that plug, dropped it over it, and it fit exactly.

Q. This is the part of this lug that you change this distance, isn't it; you work it with your fingers, this roller, right?

A. It is.

Q. When this instrument was handed to you, you took it without changing this space at all or without in any way tampering with the mechanism, you went to a plug that was in a pipe; right?

A. Right.

Q. And you laid it down, so to speak, and the distance in here fitted that plug; right?

A. No, I didn't lay it down. I have a picture showing the plug, if you would like to see that.

Q. How did you take it? Did you put it up with your hand manually?

A. Put it up with my hand. It was within easy reach——

Q. Right.

A. —and it would—may I have that a minute?

Q. Right.

A. And it would be up there in just about that position (indicating).

Q. And that distance in here (indicating) fitted the plug in here (indicating); right?

[428-437] A. Right.

Q. Exactly so; right?

A. Exactly so.

Q. Did you know that prior to the time that Chief Roberts had handed you that instrument, that the fireman had used it to put that plug in that pipe?

A. No, I did not.

Q. You didn't know that, did you?

A. Because the plug was itself loose.

Q. You didn't know that, did you?

A. No, sir, I did not. I knew that the plug had been put back in.

Q. By whom?

A. By the Fire Department.

Mr. FLANNERY: Your Honor, I don't know that there is any evidence in this case that this wrench was used to put any plug back.

The COURT: I haven't heard any. Perhaps Mr. Ford expects to produce it.

* * * * *

[438] Q. I understood you went back on the 28th and took possession of the stationery; right——

A. Yes, sir.

Q. —the box?

A. Inspector Kelly and I were both back at the house on the morning of the 28th.

Q. The 28th?

A. Yes, sir, that is correct.

Q. And you went back on the 28th because you felt it was important to take possession of this stationery because of the letter; right?

[439] A. Because of the letter that we didn't know about on the 26th.

Q. I know you didn't. But on the 28th you knew about it?

A. That is correct.

Q. So when you knew about it, you went back to the premises two days later and took this; right?

A. I did.

Q. Now you say you had this letter and you wanted to ask Mr. Green about it on the 28th; right?

A. Sergeant Couture asked him about the letter.

Q. Now, for instance, he was asked questions in your presence about the contents of that letter; right?

A. He was.

Q. Now let us take up, if you will, what first appears in the letter: "Please notify W. T. Thompson, Fredericksburg, Virginia, of Miss Betty Brown's death," then there is a period. Now that is the first sentence; that is complete; right?

A. It is.

Q. And when you had the letter there and were questioning him about it, did you ask him who W. T. Thompson was, whom he asked to be notified?

A. I didn't. I believe he was asked as to whether or not this Mr. Thompson was a relative of the deceased, so that we could contact him in the normal way.

[440] Q. Correct, and he said it was, and that gave you that; right?

A. Yes, sir.

Q. Now let's take the next sentence, rather the last part of that sentence, in fact, "Miss Betty Brown's death." Did you ask Mr. Green what he meant by that, or did Couture or anybody in your presence, if he did; what did you ask him and what did he say?

A. I don't recall that I asked him and I don't recall that anyone else did at that time. They may have.

Q. Okay, but your recollection is that so far as your recollection is concerned, you have no recollection of his being asked about that part of the letter?

A. No, sir. I was trying to get him originally—

Q. Regardless of what you were trying, the issue is what your recollection is, whether you did or not, not your reasons for doing it or not doing it.

A. My only recollection, sir, was as to the time of the writing.

Q. I understand, but I am asking you specifically about this.

A. I didn't, no, sir.

Q. And nobody did in your presence, as far as your best recollection; right?

A. Right. They may have, but I don't recall.

[441] Q. Now let's take the next sentence that he wrote: "A fine and good lady, a true friend to me." Now did you ask him what did he mean when he wrote, "A fine and a good lady"?

A. No, sir, I did not.

Q. Did you not ask him or anybody else in your presence, Couture, say, in what way was she a fine or a good lady? Did you ask him how long he had known her, how long they had been together, what was their relationship, what made her a good and a fine lady, as he states? Did Couture ask her that?

A. I didn't at that time, Mr. Ford, but I do recall that back in my original talking to him at the Emergency Hospital, he told me that he at one time had lived with her when she had a rooming house on 10th Street——

Q. That would be some years ago.

A. That would be some years back.

—and that after she gave that rooming house up, that he took this one over; she came to live with him at that time. That is the only reference that I can give you as to that.

Q. And then did either of you ask him as to that sentence, "A fine and good lady," whether or not he used to do the marketing for her, whether he used to help her or whether he used to prepare any meals for her or help her in and out of bed or anything of that kind?

[442] A. Going back to the original conversation again, as I recall, he said that she was a semi-invalid and that she was able to move about the house but she didn't go out. I believe that he said he prepared the meals and so forth for her.

Q. Did you speak to him or did you ask him or did he tell you about the birthday party he gave her just a short while before May 26th?

A. I don't recall that, sir.

Q. And did he not say—and this includes Sergeant Couture, so when I ask you the question, I mean anybody in the group having the conversation—that he had gone out and gotten ice cream and cake and had another lady friend of hers there to celebrate her birthday?

A. I don't recall. He may have said that, but I don't recall.

Q. And wasn't there a discussion about how this elderly lady particularly liked jello and he would make the jello, go

out and buy it and then come back and cook it and make it?

A. That is something else I don't know. I say, he may or may not have made the statement, I don't recall.

The COURT: You gentlemen are having a private conversation. I notice the witness isn't readily heard by the jurors back at the other end of the box.

Mr. FORD: Excuse me. I will stand back here. I can't remember the exact wording of the letter, that is why I stood [443] near him.

By Mr. FORD:

Q. Now this is the next sentence on here: "We both want it this way." Did anyone ask him what he meant when he wrote "We both," what he meant by "We"?

A. I believe Sergeant Couture asked him whether or not he had consulted with her as to this letter, in other words—and he was asked this, I am pretty sure, if my recollection goes—as to whether or not there could have been a suicide pact.

Q. Was he asked who he meant by "We"? You see, that is in the plural.

A. We assumed—we could only assume.

Q. Was he asked?

A. I don't believe he was asked, but he was asked the direct question as to whether or not the deceased was let in on this letter, whether she was conferred with.

Q. But my question is not about the writing of the letter. You see, this sentence is, "We both want it this way." Now my question is, was he specifically asked who he meant by "We"?

A. I don't recall that he was.

Q. Now it says, "We both want it this way." Was he specifically asked what he meant when he wrote "want it this way," what that meant, "want it this way?"

[444-446] A. Of course, I had something in my mind. I don't know what was in the others' mind, and I didn't ask him.

The COURT: Wait. He is asking about what was asked.

By Mr. FORD:

Q. This conversation, not what was in one's mind.

A. No, sir.

Q. And then was he asked what he meant when he wrote, "Goodby, my friend"?

A. I don't think it was broke down that way, no, sir.

Q. And then was he asked what was meant by "Please have my ashes thrown on the Chesapeake Bay"?

A. I don't recall that he was asked that, either. He could have been by the others; he wasn't by me.

Q. And then you knew, of course, that when the letter was received by the lady, this letter, there was in it two twenty dollar bills; right?

A. Yes, sir.

Q. And then there is written in this letter, "The inclosed is for flowers for her." Now was he asked who did he mean should receive flowers; who did he mean by "her?"

A. I don't think he was specifically asked. We just took the same assumption that he was referring to the deceased throughout.

* * * * *

[447] Q. Oh, I just want to get into the record a clear picture of the room at Emergency Hospital, where you interviewed Mr. Green. I understand you to say you came into the emergency room and then right off that is an operating room?

A. They have two separate rooms there. The main operating room is directly ahead as you come into the emergency room proper; off to the right is a small cubical room.

Q. I think you referred to it as an operating room.

A. Yes, they are both operating rooms; one is much smaller than the other.

Q. So that the room you interviewed him in on the morning of May 26th was an operating room in Emergency Hospital; right?

A. That is right.

Q. And while you were talking to him, were the doctors [448] and nurses coming in and out?

A. I didn't see any doctors. I believe there was a nurse or two that came in there, but they had nothing to do with him. They were coming in for materials or whatever they use.

Q. But I understood you to say at that time that you did see a patch on his chest?

A. Yes, sir, I did.

Q. And was Sergeant Couture with you at that time?

A. He was.

Q. I wonder if you would describe what that was?

A. That, I would say, was a patch; it would probably be about four inches square, taped down on the corners of the chest. I made no examination of his chest and I didn't have the nurse remove it so that I could.

Q. But in looking at it, would you say it was a surgical dressing that is used——

A. Yes, definitely.

Q. —by the hospital——

A. By the hospital.

Q. —or any other doctor in his office?

A. That is right.

Q. No question about that?

A. None at all.

Q. And that was on his chest?

[449-459] A. It was.

* * * * *

[460] GOVERNMENT RESTS.

Mr. FLANNERY: For the record, at this time the Government will rest its case.

The COURT: Very well.

Mr. FORD: Now may we approach the bench at this period?

You have rested; is that correct?

Mr. FLANNERY: Yes, sir.

(At the bench:)

RENEWAL OF ALL MOTIONS PREVIOUSLY MADE AND DENIAL THEREOF

Mr. FORD: At this point, we want to renew all of our motions previously made.

The COURT: Well, Mr. Ford, I am quite willing to allow the record to indicate that you are now renewing all motions heretofore made and reflected in the record.

Mr. FORD: Fine. that will save it.

[461-472] The COURT: And that the motions as renewed are now denied. That will give you a complete record.

* * * * *

[473-484] EVERETT D. GREEN, the defendant herein, was called as a witness in his own behalf, and after being duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION.

By Mr. BLOW:

* * * * *

[485] Q. Were you able to sleep after you went to bed at 12:00 o'clock?

A. I dozed off and woke up, and then I thought about her weak condition; I thought I had better go down and see if she is all right.

Q. Did you do so?

A. Yes.

Q. What did you find?

Take your time, Mr. Green.

A. When I went down there, I found——

Q. I have to ask you these questions.

A. Okay, I can go through with it.

When I went down there, I found her dead in bed in the same position she was when I left her, exactly.

Q. How did you know she was dead?

A. I examined her.

Q. You are not a doctor?

A. No, but I have had quite a bit of experience.

Q. What do you mean by saying that you examined her?

A. I felt her pulse. I also put my ear to her heart. There was no heart beat. I put my ear to her nose. There was no breathing. I lifted up her arm. It dropped.

[486-487] Q. In what position was she on the bed?

A. She was lying flat on her back, as I said, in the same position as the way I left her, slightly diagonally across the bed, not completely straight with the bed, but slightly diagonal on the bed, flat, like this.

Q. What did you do then, Mr. Green? Put it this way: Did you call a doctor?

A. Well, her doctor was Dr. Yates. He was a man of about 75 years old, an excellent physician and I figured there was no need calling him out at that time of the night, being as he was so old, that in the morning I would call up either he or the coroner.

Q. Did you call anyone else that night?

A. No, sir, I didn't make any attempt.

Q. What did you do then?

A. Then I got hold of my stationery and I went out in the kitchen and wrote this letter.

Q. Is that the letter that has been introduced here by the Government?

A. Yes, sir, it is.

Q. And you wrote that letter?

A. I wrote that letter and put a stamp on it.

Q. When did you write that letter?

A. It was approximately 25 minutes to 1:00 when the letter was completed. It didn't take long to write it.

* * * * *

[488] Q. Mr. Green, what was your object in writing this letter?

A. It seemed like a foolish thing afterwards to do, but my object——

The COURT: No, answer his question.

The WITNESS: My object in writing the letter was to carry out what was in the letter. I intended to bump myself off at the time.

* * * * *

[489] The WITNESS: After I completed the letter, I sealed it and put a stamp on it. There were a number of stamps in with the stationery. I put a stamp on it and carried it out and mailed it in a mail box directly in front of the house, on the sidewalk in front of the house, and that was approximately a quarter to 1:00.

By Mr. BLOW:

Q. What did you do next?

A. I came back in the house, put the lights out and went back upstairs to bed again.

Q. How long did you stay in bed?

A. I stayed in bed until approximately five or ten minutes to 7:00 the next morning.

Q. Did you sleep from the time you went to bed until that time?

A. I had a little trouble in getting to sleep, but several hours afterwards I slept clear through until about ten minutes of 7:00 the next morning, when I got up.

Q. Would you tell the jury exactly what you did when [490-491] you woke up on the morning of May 26th?

A. I got up and put on my clothes, which consisted of a pair of pants, a pair of old loafers that I wore around the house, sox, and by it being warm weather, I went downstairs with just my undershirt on and my dress shirt in my hands and laid that on a chair in the kitchen after I arrived there.

Q. What did you do next?

A. When I walked into the kitchen, I noticed the door leading to the back basement was standing open and the light was lit.

Q. Did you make a telephone call at any time that morning?

Mr. FLANNERY: I object.

The WITNESS: Well, previous to that——

The COURT: Counsel must not suggest the answers.

Mr. BLOW: Yes, sir.

The COURT: Let him tell what he knows.

The WITNESS: I skipped a point there. When I came downstairs, I went direct to the telephone, turned on the light at the telephone, because it is rather dark in that corner down there, and I made an attempt to call Mrs. Anthony in Chevy Chase.

* * * * *

[492-501] Q. What time was it when you went to that phone?

A. It was maybe two or three minutes before 7:00 A. M.

Q. What did you do when you got to the telephone?

A. I dialed Mrs. Anthony's phone.

Q. And then what happened?

A. I didn't get any response. I listened for about eight minutes and didn't get any response.

Q. Then what did you do?

A. Well, I called Mrs. Anthony for the purpose—I didn't do anything.

Q. No, I asked you what you did.

A. Well, then I went back to the kitchen, but this is the

important point to bring up, the purpose of my trying to call Mrs. Anthony. I think that should be brought out.

Q. Very well, what was your purpose for calling Mrs. Anthony?

A. I called Mrs. Anthony to tell her that I had written a foolish letter and when she received it, not to pay any attention to it. That was my intention, and I thought perhaps she had gone down to the country; her people are way down in Virginia 150 miles. I thought she had gone down there to spend a few days.

Q. But there was no answer?

A. No answer.

* * * * *

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[502] EVERETT D. GREEN, the defendant, resumed the witness stand, and having previously been sworn, was examined and testified further as follows:

THE COURT: Mr. Blow, you may resume your examination.

DIRECT EXAMINATION (resumed)

By Mr. BLOW:

Q. Mr. Green, when the Court recessed yesterday, I believe you were telling the jury that you arrived at Emergency Hospital; is that correct?

A. That is correct.

Q. Would you tell the jury exactly what occurred after you arrived at the hospital?

A. They raised the stretcher I was on up to the height of the table and they slid me over on the table, side by side, like that (indicating).

Q. Would you speak loudly so the jury can hear you?

A. Well, as I said, they raised the stretcher up to the level of the table, which was about approximately—it would strike a person along about here (indicating) in a standing position—and slid me over onto the table, where they dressed the wounds I had.

[503] Did you receive any medical treatment for those wounds?

A. Yes, sir, I certainly did.

Q. When was that?

A. That was the morning of May 26, '53.

Q. Can you remember how long you were in the hospital before you received medication?

A. I arrived there approximately around 8:00 o'clock, 8:00 a. m.

Q. Did there come a time when you were visited there by a police officer?

A. Not a police officer, a homicide officer in plain-clothes.

Q. Do you remember approximately what time that was?

A. Maybe around 9:30 or 10:00 o'clock.

Q. How long did you stay at Emergency Hospital?

A. I stayed on that table, lying flat on my back, from the time that I arrived there until approximately 3:00 o'clock, when they transferred me over to Gallinger.

Q. What was your condition during the hours that you were at Emergency Hospital?

A. I was feeling pretty badly. I had been knocked out there for approximately an hour in the house, laying there in the smoke, and I remained laying in Emergency Hospital during that time without any water or anything. I asked [504-507] the nurse; my throat hurt me, but previous to that, my throat hurt me, they dressed my wounds, put antiseptic, also injected some kind of solution into my arms.

Q. When you left the hospital, how did you leave the hospital?

A. On a stretcher. They brought in a stretcher alongside the table and slid me off the same way they did when they put me on the table, just the reverse.

Q. Where, again, were you taken from Emergency Hospital?

A. To Gallinger.

Q. Where were you taken to?

A. Transferred to Gallinger.

Q. Will you tell the jury what occurred then?

A. Well, on arrival at the hospital, they naturally carried me out and carried me into a hallway, and I stayed there for a few minutes, then they transferred me from there to an elevator, and from there to the room, where there was between six and eight beds in there, no more and no less, six and not more than eight beds. My bed was

by the window. And they did the same thing there, slid me from the stretcher onto the bed.

Q. What was your condition at that time?

A. Just about the same as it was in the early part of the morning. It was unchanged.

* * * * *

[508-533] CROSS-EXAMINATION

By Mr. FLANNERY:

* * * * *

[534] Q. Then you were taken to Emergency Hospital; isn't that right?

A. One of the men that was administering the oxygen, he says, "He's okay, take him to the hospital." And at that— I was blinded at that time, too. I couldn't open my eyes. My eyes were closed completely for at least an hour, an hour and a half, after they had taken me away from the house.

Q. My question to you, Mr. Green, was this: Were you taken to Emergency Hospital?

A. How is that?

Q. You were taken to Emergency Hospital?

A. Yes, yes.

Q. Just listen to my questions.

Now, do you remember getting to Emergency Hospital?

A. Yes.

Q. What time did you get there?

A. After they washed my eyes out, I imagine I was lying on that table for approximately three-quarters of [535] an hour before they washed out my eyes, and then when I looked at the clock, it was around about 8:30 or thereabouts. I had no idea of time, no more than the time that it was testified to at the morgue and other things, connecting up the other things.

Q. You say you looked at the clock at Emergency Hospital and saw that it was 8:30?

A. Yes, somewhere like that. Another way——

Q. Wait a minute. No question is pending.

Now after you looked at the clock and you saw that it

was 8:30, how long was it after that that the plainclothes sergeant came to talk to you?

A. He might have come there within the next hour or maybe sooner.

Q. You remember him coming there, don't you?

A. I remember of him coming?

Q. Yes, sir.

A. Yes.

Q. Do you know his name?

A. I don't know which one came first. One of them came.

Q. One of them came first and then he left and then two of them came back to Emergency; isn't that right?

A. That might be so.

Q. Sir?

A. I say, that might be so.

[536] Q. What do you mean, it might be so?

A. Well, the way I felt and all and worried about Miss Brown and the house, I just couldn't think clearly.

Q. I am asking you what you remember now. Do you remember after the first sergeant came, that sometime later he came back with another sergeant?

A. Some time two men came there. I was lying there on this table with my eyes closed and not sleeping or anything like that, but kind of felt drugged, stupid.

Q. Did they give you drugs?

Mr. FORD: Who is "they"?

The WITNESS: No, I meant to say I was stunned from that blow.

Mr. FORD: Just a minute. Who do you mean, "they"? Do you mean the doctors?

Mr. FLANNERY: The doctors.

The WITNESS: I have reference to these two homicide officers that came the second time, when they appeared there at Emergency the second time, that he has reference to.

By Mr. FLANNERY:

Q. Now let's get back to the first officer. The first officer came and talked to you and asked you what had happened there at your house, didn't he?

A. At the time when he came in, my eyes hadn't been washed out, I couldn't open them, the first time.

[537] Q. Didn't you testify a little while ago they washed your eyes out and you looked up and you could see the clock?

A. I thought I did.

Q. What time did you say it was when you looked up at that clock?

A. I just said around 8:30; I might be wrong.

Q. Didn't I ask you then how long was it after you looked at the clock that the policemen came and talked to you?

A. How long after I looked at the clock?

Q. Yes. Didn't I just ask you that, and didn't you say that it was within the hour after you looked at the clock?

A. Well, I would say now, I would say now, and giving it more thought, that it was much after 9:00 o'clock before my—I mean after 8:00 o'clock—it was nearer to 9:00 or maybe later than that when they washed my eyes out, but my eyes burned and they were closed a greater part of the time.

[538] Q. You remember Sergeant Couture coming to talk to you?

A. I would say one detective. As to which one came first, I don't know.

[539] Q. Did he ask you what had happened there at your house?

A. Yes.

Q. Did you tell him what happened?

A. I told him as near as I could or tried to.

Q. What did you tell him?

A. I don't recall what I told him. I told him about this man hitting me and about going downstairs and seeing this little fire in the front of the house.

Q. You remember telling him that, don't you?

A. Yes, I did.

Q. Now he talked to you there for a short time, then. Isn't it a fact that he came back with another police officer?

A. Later on, maybe within an hour and a half or so, something like that.

Q. Then the two of them asked you what had happened there, didn't they?

A. I think I repeated it as near as I could the same as the first time.

Q. You repeated the same thing you told Sergeant Couture the first time?

A. That is my recollection.

Q. Is that right?

A. I think I did.

Q. They didn't threaten you or make any promises to you, did they?

[540] A. No.

Mr. Ford: I object. He has never said that or testified to it.

The Court: Objection overruled. Answer the question.

The Witness: You say they never threatened me?

By Mr. Flannery:

Q. I am asking you, did they?

A. No.

Q. They asked you what had happened, didn't they?

A. Yes.

Mr. Ford: I submit that that has been answered before. He has already asked him, didn't they ask you what happened, and he told them.

The Court: The answer may stand.

By Mr. Flannery:

Q. Did they the second time ask you any questions which you had not been asked on the visit of the first police officer?

A. I don't remember of any.

Q. Did they ask you about the plug being taken off of that gas line?

A. I don't even remember of them asking me that.

Q. Did they ask you about an ice pick at that time?

A. I think they did.

Q. You remember that?

[541] A. I think so.

Q. What did they ask you about the ice pick?

A. The exact words I couldn't tell you.

Q. Give us your best recollection.

A. I tell you frankly, I don't remember exactly how they asked it.

Q. You don't have to give it to us exactly, Mr. Green. Just give us your best memory of it.

A. They asked me something about it. They asked me what happened. I told them about the man hitting me and stabbing me. I don't know what else they could ask about or what they did ask me about.

Q. Did they ask you about writing a letter?

A. I couldn't say whether they did at that time or not.

Q. Now then, you were taken over to Gallinger or D. C. General Hospital, weren't you?

A. Approximately around 3:00 o'clock, the best I can recollect.

Q. And then do you remember when you were there that same afternoon, May 26th, that two firemen came over and talked to you?

A. Two firemen came, a chief with a lot of brass on him, and he, contrary to the evidence here, he didn't open his mouth. Inspector Kelly did all the talking.

Q. Did Inspector Kelly come over?

[542] A. He came with him.

Q. He asked you what had happened, didn't he?

A. Naturally, I take for granted he did.

Q. What did he ask you?

A. He asked me about what happened at the house. I told him as best I could.

Q. What did you tell him?

A. That—my memory is not clear at all. I do remember that chief, whatever you want to call him, with the brass on—he didn't have anything to say.

Q. What did Inspector Kelly have to say?

A. He asked about the fire, but his exact words I don't remember at all.

Q. What did you say to him about the fire?

A. That could have been the time when he said to me, Now, Mr. Green, you are getting up in years; you want to clear yourself with the man upstairs, or something to that effect.

Q. Do you remember that?

A. Yes, I do.

Q. Very clearly?

A. Yes, sir.

Q. What else do you remember?

A. I remember of the police coming there; I think it

might have been the captain of the Homicide Squad. He didn't have anything to say to me.

[543] What I mean, Mr. Green, is what else do you remember of the conversation you had with the two firemen?

A. They asked me such questions as has been stated here along that general line as to what happened and so forth and wanted to know if I set any fires and such stuff as that. I told them no.

Q. Didn't they ask you whether or not you had written a letter?

A. They could have.

Q. I am asking you, do you remember?

A. No.

Q. You don't remember that?

A. No.

Q. Now, how long did they talk to you that afternoon?

A. I think there was a clock in the room; I am not sure —no, the clock was in the hall. They might have stayed 15 minutes.

Q. Then there came a time, I believe, the next day, May 27th—no, I think it was May 28th, the morning of May 28th —didn't Sergeant Clarke, Sergeant Couture and Inspector Kelly come over there to the D. C. General Hospital and have in their possession at that time this letter, which you say now that you did write?

A. I think I remember that.

Q. They had that letter, didn't they?

[544-563] A. Yes.

Q. And at that time they asked you if you had written the letter?

A. Yes.

Q. At that time you told them that you had written a letter?

A. Yes, that is right.

Q. Now isn't it a fact that when you had been asked that question before they had the letter, you had been asked that question a day or so before, that you had denied writing a letter?

A. Well, at that time I felt a considerably bit better than I did the day before.

Q. No, the question is, hadn't you before they actually

had the letter in their hand—hadn't you a day or so before denied writing a letter?

A. Yes, I did, because I never at that time had any recollection of writing any letter.

* * * * * *

[564-571] The Court: Do you have any prepared instructions or are you leaving that to me?

Renewal of All Motions Previously Made and Denial Thereof

Mr. Ford: A couple we have, Your Honor.

First, I would like to renew all the motions we have heretofore made, now that the case is entirely in. And then we have some written instructions we would like to submit to Your Honor.

The Court: Let the record show that the renewed motions are denied.

* * * * * *

[572] Argument on Behalf of the Government

* * * * * *

The defendant in this case is charged with first degree murder. He is charged with having committed arson and, [573-577] in the course of the arson, having caused the death of Betty Brown. Now I say first degree murder, ladies and gentlemen. I think most laymen have the impression that in first degree murder you have got to have premeditation, deliberation, intent to kill. Ladies and gentlemen, that is true ordinarily if the so-called common law statute is used in the indictment. The common law statute isn't used in this crime, ladies and gentlemen. This is a so-called felony murder. In this this case the Government does not have to prove deliberation, premeditation, intent to kill. His Honor will explain that to you.

* * * * * *

[578] Now the defendant having been taken from the premises, ladies and gentlemen, was taken to Emergency Hospital. Sergeant Couture talked to him, and you re-

member Sergeant Couture's testimony. He went up there. At that point Sergeant Couture, according to his own testimony, didn't know what had caused the fire nor have any information. All he knew was there had been a fire at the place and this man had been taken out of the fire, and he wanted to find out the facts about it. He went up and talked to Green, and Green told him the story about the unidentified colored man. Later that day Sergeant Clarke and Sergeant Couture go back and they talk to this man again, and Sergeant Clarke at that time had seen the box of [579-588] letter paper which is in evidence here, and Sergeant Clarke asked this man, Well, now, did you write any letters, Mr. Green? What did Mr. Green say? Mr. Green said no. Then later Mr. Green is questioned, I believe, that afternoon, the afternoon of May 26th, by Inspector Kelly. Again he is questioned. Again he makes no reference to a letter. He makes no reference to the letter, ladies and gentlemen, until the letter is received by Mrs. Anthony, the witness in the case, until he is confronted with the physical evidence in the case, the letter, and then he says, Oh, yes, I wrote the letter.

Now the defendant tells you in this case, ladies and gentlemen, that he found the deceased dead. He would have you believe, ladies and gentlemen, that her death was not caused by this fire, that she was dead before the fire started. But the evidence is overwhelmingly against that, ladies and gentlemen. There is not a shred of evidence in this case to the effect that this woman was dead other than his own statement, and if there was any question about it after having heard the testimony of Dr. Rosenberg and heard the testimony of other witnesses in this case, that question should have bene resolved, ladies and gentlemen, when you heard the defendant himself testify, because he told you a completely unreasonable story, a story, ladies and gentlemen, which I say is false on the very face of it. His story just doesn't make sense.

* * * * *

[589] He tells you further that yes, he remembers talking to Sergeant Couture and Sergeant Clarke at Emergency Hospital, yes, he remembers talking, he remembers about that unidentified colored man. But he doesn't remember

discussing the letter, no, he doesn't remember discussing that letter. So far as he can remember, the first time he discussed the letter is when the letter was brought to him.

Ladies and gentlemen, he is asked, Well, now, Mr. Green, you say you found the deceased in this case dead. Why didn't you, when Sergeant Couture first came up there and talked to you—why didn't you say, oh, Sergeant, this is what happened; last night I discovered Betty Brown dead, and then if he wanted to follow through with the rest of that story, then I went downstairs and this unidentified colored man stabbed him. But no, he didn't tell Sergeant Couture that. He didn't tell Sergeant Clarke that. He didn't tell Inspector Kelly that. He didn't tell them that over at the morgue. Why didn't he? Because it is a story he thought up afterwards.

Ladies and gentlemen, it makes sense in this case to [590-591] take this view of it. If that poor old lady had been dead, as he says she was, he would have told the officials investigating this matter about it just as soon as possible. Don't you know he would? Doesn't it make common sense that he would? Isn't the fact that he didn't an indication to you that he is not telling you the truth now?

* * * * *

[592-595] ARGUMENT ON BEHALF OF THE DEFENDANT

* * * * *

[596-597] The COURT: Mr. Ford, you may address the jury.

* * * * *

[598] And the law says, not me, ladies and gentlemen, the law says that you are here as individual jurors. It is not a regimentation of you, no. Each one, by yourself, is asked to render a verdict based upon your conscience and the evidence as you hear it. And let me say something further. On all questions of fact—remember, I said all, and I meant it; there is no exception, none whatever; no mind can conceive of an exception—on all questions of fact, you and you, and you and you, and all of you, are the sole judges of it in this case. Whatever you individually decide to be the facts [599-624] in this case, no living soul, no, to the highest court

in the land, the Supreme Court of the United States, can say that about it; no living soul, organization, I care not where it may be, can hold you to their opinion on questions of fact, for you are the sole judges of the facts, and when you have made up your mind fairly and justly as a human being, then I beg you to stick with it until you die, and you are responsible to no one. That is our system of justice, the American system of justice, and please remember it. No one on the face of the earth can challenge your individual decision on what you consider the facts to be. Please, I ask you, as he does, under your solemn oath and sacred oath, please, to follow out that principle of our law.

* * * * *

[625] The Court: Mr. Flannery, you may address the jury.

ARGUMENT IN REBUTTAL.

* * * * *

[626] Now Mr. Ford talks about the functions of all of us here. He told you what his function was, and Mr. Blow's, and certainly he has carried his functions out in the highest tradition. Now my function is to present the evidence to you in behalf of the people of this community. The grand jury has stated that a crime has been committed, that a woman has been killed; it is murder. It is my duty to bring those facts to you. That is Mr. Ford's duty. It is my duty. What is your duty and function in this case? I will tell you at the outset what it is not. It doesn't consist in sending this defendant to the electric chair. You have nothing to do with sending this defendant to the electric chair. Your duty as representatives and members of this community is to sit here, listen to the facts, take the law that His Honor will give you which governs this case, and then in accordance with the facts and with the law, to reach a fair and impartial verdict based on the evidence and the law, and on nothing else.

At that point, ladies and gentlemen, you will decide what you are going to do in the case, come back with your verdict, and that ends your responsibility, just as Mr. Ford's responsibility is ended, and Mr. Blow's, when they have sat down. When you go out, their responsibility will end, and they will

have discharged their duty in the highest tradition. My job will be over when I sit down here. Your job will be over [627] when you come back with your verdict.

Now if you should find this defendant guilty, the responsibility as to the consequences of your verdict falls to someone else. It is not you. You don't have to come down here at sometime later or even today or tomorrow, whenever you bring your verdict back, and say, well, now, you go to the electric chair. That is not your function. That is His Honor's function. And it doesn't end there. There is the United States Court of Appeals. They have a responsibility to sift the facts and look them over and decide whether this man will go to the electric chair. There is the Supreme Court of the United States. If they see fit, they can look these facts over and decide if this man goes to the electric chair. There is the President of the United States, who may look these facts over, and as you well know, often these sentences are commuted to something less than death in the electric chair. There is The Attorney General of the United States, who may make recommendations to the President of the United States relative to this sentence.

Now I mention that, ladies and gentlemen, because I want to emphasize to you that it is the responsibility of those people, the Judge, the Court of Appeals, the Supreme Court, if they should decide to hear the case; the President of the United States, if it should come to his attention. It is the responsibility of those people to decide whether this man [628-632] goes to the electric chair. It is not yours, ladies and gentlemen. I want to emphasize that because I consider it important that your function be defined by me to you. So bear that in mind, ladies and gentlemen, and bear in mind your function in this case is fact-finders. You are the fact-finders. You have to decide: (1) Did Green set the fire? (2) Did Miss Betty Brown die as a result of the fire? And that ends your function in the case, and the responsibility of other people comes into it when we consider the answer or consequences as to what is going to happen to this man.

* * * * *

[633] Now with this, ladies and gentlemen, I will leave the case with you.

I want to emphasize again your function, your responsibility in the case. Your responsibility is to make a finding

on the facts and the law as to whether or not this man set the fire and whether or not this woman died as a result of it. Your function is not to send this man to the electric chair. I want to emphasize that, ladies and gentlemen, and that should not properly be a matter for your consideration.

The consequences or the result of your verdict is something that you are not concerned with or should be concerned with.

As I say, there is the Judge in this case, the Court of Appeals, the Supreme Court, the President, The Attorney General, and I am sure this man's rights will be protected all the way along the line. It is the responsibility of these other people to decide what to do with this man and not you, and I am sure his rights will be protected all along the line.

The COURT: The jury will keep in mind the admonition and take a five-minute recess.

[634] THE COURT'S CHARGE TO THE JURY

The COURT: Ladies and gentlemen of the jury, it is provided by statute that whoever being of sound memory and discretion, without purpose so to do, kills another in perpetrating or in attempting to perpetrate any arson, rape, mayhem, robbery or kidnapping is guilty of murder in the first degree. You are told that the punishment for murder in the first degree shall be death by electrocution.

The indictment is drawn in two counts. You are told that you will not be concerned with the first count of the indictment but will limit your consideration entirely to the allegations and charges found in the second count of the indictment. The second count specifies that on or about May 26, 1953, within the District of Columbia, the defendant, Everett D. Green, committed the offense of arson; that is to [635] say, he maliciously did burn, and cause to be burned, a certain building known as 1115 Massachusetts Avenue, Northwest, the property of Gerald Freed, and in perpetrating the offense of arson aforesaid, caused Betty Brown to inhale certain gases, the inhalation of which resulted in her death, within the District of Columbia, on or about May 26, 1953.

The definition of arson is found in the statute, which provides that whoever shall maliciously burn or attempt to burn any building or house, barn or stable adjoining thereto, or

any store, barn or outhouse or any shop, office, stable, store, warehouse or any other building, the property in whole or in part of another person, shall be guilty of the crime of arson and shall be punished by imprisonment in the penitentiary.

To this indictment the defendant has entered a plea of not guilty.

[636] The essential elements of the crime charged in the indictment are:

(1) that the defendant, on or about May 26, 1953, intentionally and maliciously did burn or attempt to burn the building known as 1115 Massachusetts Avenue, Northwest, in the City of Washington, in the District of Columbia;

(2) that such building was the property of another per-

[637-646] son, to wit, one Gerald Freed;

(3) that in burning or attempting to burn such building, the defendant acted with malice;

(4) that the death of the deceased, Betty Brown, was caused by and was the direct result of the defendant's act in burning or attempting to burn such building.

If the Government has proved to your satisfaction beyond a reasonable doubt each of the elements as stated, then your verdict will be guilty as charged. If you find that the Government has failed to prove any one of such elements to your satisfaction beyond a reasonable doubt, then your verdict must be not guilty.

As I have told you, the defendant's intention to burn or to attempt to burn the building is an essential element of the crime charged in the indictment. You are now told that intent to kill is not a material element of the crime charged.

* * * * * *

[647] VERDICT

(At 10:30 p. m., the following proceedings occurred:)

The CLERK: Mr. Foreman, has the jury agreed upon a verdict?

The FOREMAN: We have, Your Honor.

The CLERK: What say you as to the defendant Everett D. Green on Count 2?

The FOREMAN: Guilty as charged.

[648] The COURT: The defendant will be committed for sentence.

Mr. Ford, is there any reason or occasion for a reference [649] of this case to the probation office?

Mr. FORD: I would say——

The COURT: I know of none.

Mr. FORD: I don't know of any, either, because it is mandatory.

The COURT: The defendant will be committed for sentence.

(Thereupon, at 10:35 o'clock p. m., the trial in the above-entitled cause was concluded.)

[650-694] (Reporter's Certificate to foregoing transcript omitted in printing.)

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[695] [File endorsement omitted]

In United States District Court for the District of Columbia

[File endorsement omitted]

UNITED STATES

vs.

EVERETT D. GREEN, *Defendant*

Criminal No. 1083-53

Charge Arson; First Degree Murder

VERDICT—May 19, 1955

On this 19th day of May, 1955, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon after hearing further of the evidence and the instructions of the Court, the two alternate jurors are discharged from further consideration in this case. The jury retires to consider their verdict.

The jury returns into Court and upon their oath say that

the defendant is guilty as indicted on count two; and thereupon each and every member of the jury is asked if that is his or her verdict and each and every member thereof says that the defendant is guilty as indicted on count two.

The defendant is remanded to the District of Columbia Jail.

By direction of

F. Dickinson Letts,
Presiding Judge,
Criminal Court #2.

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[696] [File endorsement omitted]

In United States District Court for the District of Columbia

[File endorsement omitted]

[Title omitted]

Motion for Judgment of Acquittal—Filed May 20, 1955

The defendant moves the court for a judgment of acquittal for the following reasons:

1. The court erred in not declaring a mistrial when the United States Attorney made statements to the jury which substantially prejudiced the defendant.
2. The court erred in denying the defendant's motion to dismiss the indictment on the ground that he had once been in jeopardy for the offense of first degree murder.
3. The evidence presented by the Government is insufficient to sustain a conviction.
4. And for such other reasons as will appear when this motion is heard.

Respectfully submitted,

George Blow.

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[697] Certificate of Service (omitted in printing)

[698] [File endorsement omitted]

In United States District Court for the District of Columbia

[File endorsement omitted]

[Title omitted]

MOTION FOR NEW TRIAL—Filed May 20, 1955

The defendant moves the court to grant him a new trial for the following reasons:

1. The court erred in excluding testimony and records.
2. The court erred in admitting conversations between police officers and defendant on May 26, 1953.
3. The court erred in refusing to permit cross-examination of prosecution's witnesses on topic testified to by witness on direct examination.
4. The court erred in charging the jury.
5. The defendant was substantially prejudiced and deprived of a fair trial by reason of statements made by the United States Attorney to the jury.
6. The court erred in admitting testimony to which objections were made.
7. The court erred in denying defendant's motion for judgment of acquittal made at the close of the Government's evidence.
8. The verdict is contrary to the weight of the evidence.

[699] 9. The verdict is not supported by substantial evidence.

10. The court erred in not instructing the members of the jury sufficiently during the course of the trial regarding their obligation to disregard newspaper coverage of the trial.
11. And for such other reasons that will appear when this motion is heard.

GEORGE BLOW.

CERTIFICATE OF SERVICE (omitted in printing)

[700] [File endorsement omitted]

In United States District Court for the District of Columbia

[Title omitted]

[File endorsement omitted]

Criminal No. 1083-53

Charge Arson; First Degree Murder

ORDER DENYING MOTION FOR NEW TRIAL, ETC.—June 10, 1955

On this 10th day of June, 1955, came the attorney of the United States, the defendant in proper person and by his attorneys George Blow, Esquire and Charles E. Ford, Esquire; whereupon the defendant's motions for new trial and for judgment of acquittal each coming on to be heard, after argument by counsel, are by the Court denied.

The defendant is remanded to the District of Columbia Jail.

By direction of

F. DICKINSON LETTS,
Presiding Judge,
Criminal Court #2.

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[701] [File endorsement omitted]

In the United States District Court for the District of Columbia

CRIMINAL NO. 1083-53

UNITED STATES

vs

EVERETT D. GREEN

JUDGMENT AND COMMITMENT—June 17, 1955

On this 17th day of June 1955 came the attorney of the Government, and the defendant appeared in person and by counsel, George Blow and Charles E. Ford, Esquire.

It is adjudged that the defendant has been convicted upon

his plea of not guilty and a verdict of guilty of the offense of

Murder in the First Degree
(Vio. Sec. 2401, T. 22, D. C. C.)

as charged in count two;

And the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

The sentence of the Court was as follows; and it is so adjudged:

Everett D. Green, you have been found guilty upon an indictment including the charge for the offense of Murder in the First Degree, and, upon the verdict of guilty, you are hereby sentenced to the punishment of death by electrocution; and it is

Ordered that you, Everett D. Green, be forthwith taken to the District of Columbia Jail, otherwise known as the Washington Asylum and Jail, in the District of Columbia, and there be kept in close confinement; and that on the 4th day of November, A.D., 1955, you be taken to the place prepared for your execution in the District of Columbia [701a] Jail, and that then and there you be electrocuted according to law; and it is

Further ordered that a certified copy of this judgment and commitment be transmitted by the Clerk of the United States District Court for the District of Columbia to the Superintendent of the aforesaid District of Columbia Jail not less than ten days prior to the time fixed in this judgment of the Court for the execution of the same.

F. Dickinson Letts,
Judge.

[702] [File endorsement omitted]

In the United States District Court for the District of Columbia

(Title omitted)

NOTICE OF APPEAL—Filed June 17, 1955

Name and address of appellant:

Everett D. Green
200 19th Street, S. E.
Washington, D. C.

Name and address of appellant's attorneys by court appointment:

George Blow
701 Union Trust Building
Washington, D. C.
Charles E. Ford
416 Fifth Street, N. W.
Washington, D. C.

Offense: First degree murder

Concise statement of judgment or order, giving date, and any sentence: Defendant was adjudged guilty of murder in the first degree on June 17, 1955, and a sentence of death was imposed. Name of institution where now confined, if not on bail:

District of Columbia Jail
200 19th Street, S. E.
Washington, D. C.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Dated June 17, 1955.

EVERETT D. GREEN,
Appellant.
GEORGE BLOW

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[703] Clerks Certificate to foregoing transcript omitted in printing.

[704] [File endorsement omitted]

In the United States Court of Appeals for the District of Columbia Circuit

No. 12,809

EVERETT D. GREEN, Appellant

v.

THE UNITED STATES, Appellee

Appeal from Judgment of the United States District Court for the District of Columbia

PETITION FOR REHEARING—Filed February 24, 1956

On behalf of appellant, it is prayed that this case be reheard, with oral argument, by the Court *en banc*. The case was decided on February 9, 1956. This is an appeal from a judgment of electrocution for killing another while perpetrating an arson, imposed after appellant's second trial upon the same indictment.

Grounds For Rehearing

Court-appointed counsel for appellant present the following grounds in support of this Petition for Rehearing:

I. The present opinion, if followed, will allow multiple prosecutions for varying degrees of the same offense in the District of Columbia. In rejecting appellant's contention that an unappealed conviction of arson barred a second prosecution for killing another while perpetrating that arson, the present opinion misinterprets the test of identity of offenses upon which it relies. Under the test adopted in the opinion at pages 7-8, appellant has been twice in jeopardy. His conviction and the mandatory sentence of death imposed should therefore be set aside.

[705] II. A five-four opinion of the Supreme Court, rendered over fifty years ago, has *for the first time* been applied to the federal (as distinguished from the insular) courts by a Circuit Court of Appeals so as to abrogate, the rule at common law that one erroneously convicted of an offense lesser in degree than that charged will not, by seek-

ing review of his conviction, be presumed to have waived the protection otherwise afforded him by his acquittal of the higher. Retrial, at common law, is limited to that offense of which the accused was previously convicted. The common law rule was incorporated in the Bill of Rights.

III. The first point made in the present opinion implies that appellant had requested a new trial. In fact, he had not. Since current opinions of the Supreme Court indicate that one may, under certain circumstances, waive his defense of former jeopardy by requesting a new trial, review by the Supreme Court of this case may be difficult to obtain if this portion of the opinion is not amended so as to make it clear that appellant's counsel at oral argument on his first appeal informed the Court that retrial would, in his opinion, raise questions of former jeopardy.

IV. A Supreme Court rule intended to preclude the *opportunity* for police interrogation of a suspect before he has been brought before a committing magistrate and advised of his right to counsel and his right not to make statements which might later be used against him is substantially weakened by the present opinion, which holds that certain statements of the accused, heavily relied upon by the prosecution, were admissible, *not in spite of, but because of* the fact that appellant apparently required medical treatment. (opinion, p. 8).

[706] After his arrest, Caneen was held by police in the "strong room" at Gallinger Hospital for two and a half days, where, "without the aid of friends or the benefit of counsel," he was interrogated by police and fire department officers.

The present opinion raises the question whether overzealous police may not find it convenient to hospitalize a suspect in order to obtain sufficient evidence to convince a magistrate that he should be committed.

V. The present opinion, by describing certain remarks made by the prosecuting attorney to the jury as "insufficient" reason for reversal, even when considered in light of other errors advanced by counsel, condones reference in the trial court to the responsibility of this Court to "sift the facts", that of the Supreme Court and the President to "look these facts over," and to that of the attorney general to make recommendations "to the President of the

United States relative to this sentence." The jury should not be told that responsibility for determining the facts can be shifted to the reviewing authorities.

Statement of Facts

Appellant was tried upon an indictment charging, in two counts, arson and killing another while perpetrating that arson. "Found guilty of arson under the first count and of murder in the second degree under the second," Green appealed "only from the latter." (*Green* v. *United States*, No. 12,188, decided January 20, 1955). This Court found that there was no evidence to sustain the conviction. All the evidence indicated that Green was either guilty of [707] killing another while perpetrating an arson, which carries a mandatory death penalty, or he was not guilty. On remand, the Government moved to try Green again for killing while perpetrating the arson. His plea of former jeopardy was rejected by the trial court. Found guilty, he was sentenced to death. This appeal followed.

Points on Appeal

Upon his appeal to this Court Appellant relied on these points:

(1) Former jeopardy.

(2) Admission of statements elicited by interrogation over a two-and-one-half-day-period before being taken before a committing magistrate, was error.

(3) The prosecution's summation induced the jury to disregard its responsibility.

(4) Exclusion of material testimony offered by the defense left damaging inferences from prosecution testimony immune from contradiction.

(5) Granting of prosecution's requested instruction that the "vitality" of the deceased was an "immaterial consideration" tended to remove from the jury's consideration the question whether Miss Bettie Brown died as a result of her general debility rather than as a result of inhaling smoke.

(6) The trial court's admonition to the jury inadequately warned them to ignore misleading newspaper interpretations of the issue in the trial, and the failure to repeat the admonition whenever the jury separated was prejudicial.

Discussion of Opinion

The following discussion of the present opinion is broken down into sections corresponding to the grounds for rehearing herein urged:

(1) In order to defeat appellant's contention that his unappealed conviction of arson barred a subsequent prosecution for killing another while perpetrating arson, the di- [708] vision of this Court which heard this appeal has in effect ruled that a conviction of a lesser included offense will not bar the Government from afterwards seeking a conviction on the greater offense *even when there has been no appeal.* Hereafter, one indicted and tried for deliberate and premeditated murder who is convicted of second degree murder, and does not appeal, may again be prosecuted for first degree murder.

The test of identity of offenses adopted by this Court is that in *Morey* v. *Commonwealth* 108 Mass. 433, (1871). As stated by the Supreme Judicial Court of Massachusetts in *Morey* v. *Commonwealth, supra,* quoted on page 7 of this opinion, "*if each statute* requires proof of an additional fact which the other does not,* an acquital or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (Emphasis supplied.)

Under this rule, Green was clearly exempt from a second prosecution for killing another in perpetration of an arson because every element of the crime of arson had to be proved before he could be guilty of the killing. Thus, rather than "each statute," only one required proof of an additional fact.

The present opinion, however, rejected Green's plea of double jeopardy because "evidence sufficient to convict Green of arson under the first count would not have con-

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* The cases cited in support of this test are all examples of separate statutory offenses, each of which required proof of a separate act and a separate intent not required in the other—Carter v. McCluaghry, 183 U. S. 365 (1902) (conspiracy to defraud and causing false and fraudulent claims to be made); Gavieres v. United States, 220 U. S. 338 (1911) (indecent behaviour in public and insulting and threatening a public official); Morgan v. Devine, 237 U.S. 632 (1915) (breaking and entering and larceny).

[709] victed him of murder under the second, which required proof that the death of a human being was caused by the arson."

> "Hence the conviction of arson did not preclude later prosecution and conviction of murder committed in the perpetration of the arson."

Under this interpretation of the test adopted, no prosecution for a greater offense is precluded by an unappealed conviction or acquittal of the lesser included offense. The latter offense, by definition, must always lack the element which would make it the greater offense.

Normally, in order to commit murder, one need not commit arson. This was not true in the instant case where the indictment charged that the defendant, in perpetrating arson caused the deceased to inhale certain gases, the inhalation of which resulted in her death. Unless Green were guilty of arson, he could not be guilty of the killing charged. The multiple nature of the prosecutions here is demonstrated by the fact that in Green's second trial it was necessary for the Government to show again that he was guilty of arson —the same offense of which he had been found guilty a year before and had not appealed—and that deceased died from inhaling gases produced by that same fire.

The decision in *State* v. *Cooper*, 1 Green 361, 25 Am. Dec. 490 (N.J. 1833), which is directly in point, and which has been twice cited with approval by the Supreme Court,* is completely consistent with the test adopted by he present opinion, and should be determinative of the question presented.

[710] (2) The present opinion (pages 1-6), rejecting appellant's contention that his trial upon an indictment charging an offense for which he was once tried, but not convicted, placed him twice in jeopardy within the meaning of the Fifth Amendment, relies upon the opinion of Mr. Justice Peckham in *Trono* v. *United States*, 199 U. S. 521, 26 S.Ct. 121 (1905).

Three Justices of the Supreme Court agreed with Justice Peckham in the *Trono* case that "the better doctrine is that which does not limit the Court or jury, upon a new

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* See Appellant's Reply Brief, p. 2.

trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial. . . ." Four Justices disagreed. Mr. Justice McKenna emphasized that an accused should not be compelled to surrender his acquital of a higher offense as the price of seeking reversal of an erroneous conviction of the lesser. *Trono* v. *United States, supra,* at 538-539. As the division of the Court which heard this appeal noted on page 4 of its opinion of February 9, 1956, the deciding vote was cast by Justice Holmes.

The present opinion concluded that the Peckham holding must have been the holding of a majority of the Supreme Court because Mr. Justice Holmes had earlier, in *Kepner* v. *United States,* 195 U. S. 100, 134, 24 S. Ct. 797 (1903), indicated that he was unsympathetic to the concept of former jeopardy, no matter how defined. He dissented in *Kepner* from the decision of the majority of the Supreme Court denying the Government a right to appeal in a Philippine criminal case. If the views of Mr. Justice [711] Holmes in the *Kepner* case indicate, as the present opinion suggests, that he concurred in Mr. Justice Peckham's choice of the "better doctrine" for the federal courts, the remarks of Mr. Justice Brown in the same case indicate that he felt otherwise. Mr. Justice Brown, who concurred in the Peckham opinion, in the *Trono* case, made it clear in the *Kepner* case that he did not trust a Philippine magistrate with the "great and dangerous power of finally acquitting the most notorious criminals." *Kepner* v. *United States, supra,* at 137. This power, of course, is entrusted to Federal trial courts in the continental United States.

This is the first time that a Circuit Court of Appeals has examined the 1905 split in the Supreme Court and followed it in a closely related case. The present opinion adopts the opinion of the four Justices in the majority as "one with which we agree." The common law rule, made applicable to the federal courts by the Fifth Amendment, was otherwise.* At least 16 states in this country follow

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* "If the prisoner is convicted on one count of an indictment and acquitted on another, and then obtains a new trial, he is only tried

the common law rule. (See appellant's brief, pp. 15-16). [712] If an accused has been convicted of an offense lesser in degree than that for which he was indicted, and there is serious error in his trial, he should not be required to elect between suffering his erroneous punishment silently or risking retrial on the higher offense of which he was previously acquitted.

(3) A paragraph in the decision of this Court of January 20, 1955, reappears on page 2 of the decision of February 9, 1956. We believe that this paragraph conveys a misleading impression that Green sought a new trial following his conviction of arson and second degree murder at the first trial. In fact, no motion for a new trial was made in the trial court following his first conviction. On appeal, he urged simply that his conviction of murder in the second degree should be reversed. While it is true that Green did clearly understand the possible consequence of a successful appeal, his counsel also suggested to the Court at the time of oral argument there would be a problem of former jeopardy if the Government attempted to try Green again for killing another while perpetrating arson.

Since the Supreme Court has indicated that the defense of former jeopardy may be waived in certain cases if the defendant moves for a new trial, *Sapir* v. *United States*, 348 U. S. 373, 75 S. Ct. 422 (1955), *Bryan* v. *United States*, 338 U. S. 552, 70 S. Ct. 317 (1950), we respectfully submit that in the interest of fairness to appellant there should be no suggestion of waiver in the record which may be transmitted to the Supreme Court. It is therefore respectfully [713] requested that the opinion be modified so as to state that there was, in fact, no request for a new trial following Green's first conviction, and that the Court was informed that a retrial would raise questions of former jeopardy.

(4) The present opinion holds that the *McNabb* rule does not apply to exclude incriminating statements obtained by police from appellant on the first and last days of a two-

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afterwards on the count on which he was before convicted." 2 Cooley's Blackstone, 360, n. 15 (3rd Ed. 1884).

"In ascertaining the meaning of the phrase [twice in jeopardy] taken from the Bill of Rights it must be construed with reference to the common law from which it was taken." Kepner v. United States, 195 U.S. 100, 125-126, 24 S. Ct. 797 (1903).

and-a-half-day period between his arrest and his appearance before a committing magistrate. The opinion states simply that there was no confession and that appellant was taken before a committing magistrate as soon as he was released from the hopsital.

The Supreme Court has determined that exculpatory statements are no different from other admissions of incriminating facts. See *Opper* v. *United States*, 348 U. S. 84, 92, 75 S. Ct. 158, 163-164 (1954).

We submit that there is a distinction between a hospital and the "strong room" of a hospital in which prisoners are kept. (R. 279). Appellant was in police custody. The ward was locked and guarded by a police officer. At no time while appellant was being interrogated by police or fire department officers was he informed that he had the right to counsel and the right not to make statements which might later be used against him. The opinion indicates that the *McNabb* rule will be applied to protect those suspects in police custody who are well, but not those who are wounded. [714] Two judges of that division of this Court which heard Green's second appeal shortly afterwards, in *Tillotson* v. *United States*, No. 12,503 (Feb. 14, 1956), indicated that the *McNabb* rule will not be applied unless the accused has been coerced. In that case, an oral confession was obtained after a morning of questioning. The opinion suggests that only after an oral confession was obtained was accused informed that she did not have to make a statement, and that any statement might be used against her. The Court found that the accused had been neither coerced nor illegally detained. The vice condemned by the Supreme Court in *McNabb* v. *United States*, 318 U. S. 332, 63 S. Ct. 608 (1943), however, was not coercion, but resort by police to questioning persons in custody who are "without the aid of friends or the benefit of counsel." 318 U. S. at p. 345.

The present decision, read with that in the *Tillotson* case, opens up the opportunity for secret interrogation that the *McNabb* rule was intended to foreclose.

(5) Finally, in its concluding paragraph, the present opinion rejects as "insufficient" other reasons for reversal urged by Court-appointed counsel, among them forensic misconduct by the prosecution in the closing moments of the trial. We regard the District Attorney's references to

this Court's "responsibility to *sift the facts* and *look them over* and decide whether this man will go to the electric chair;" to the role of the Supreme Court which, "if they [715] see fit, . . . can *look these facts over* and decide if this man goes to the electric chair," and to the role of the President of the United States, "who may *look these facts over*" and might commute the sentence, and other like remarks, as substantially prejudicial to the rights of this elderly and rather pitiful defendant charged with the killing of his best friend.

For this Court to refrain from discussing these remarks cannot help but encourage future conduct of this sort by prosecuting attorneys.

Conclusion

WHEREFORE counsel for appellant pray that this Court *en banc* will rehear this case with oral argument.

Respectfully submitted,

GEORGE BLOW,
701 Union Trust Building,
Washington 5, D. C.
CHARLES E. FORD,
401 3rd Street, N. W.,
Washington 1, D. C.
GEORGE RUBLEE II,
701 Union Trust Building,
Washington 5, D. C.
Counsel for Appellant by
Court-appointment.

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[716] CERTIFICATE OF SERVICE (omitted in printing)

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[717] CERTIFICATE OF COUNSEL (omitted in printing)

[718] [File endorsement omitted]

In United States Court of Appeals for the District of Columbia Circuit

No. 12,809

EVERETT D. GREEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

OPINION ON REHEARING EN BANC—Decided June 28, 1956

Messrs. George Blow and *George Rublee, II*, (both appointed by this Court), with whom *Mr. Charles E. Ford* (appointed by the District Court) was on the brief, for appellant.

Mr. Harold Greene, Assistant United States Attorney, for appellee. *Messrs. Leo A. Rover*, United States Attorney at the time brief was filed, and *Thomas A. Flannery* and *Lewis Carroll*, Assistant United States Attorneys, were on the brief for appellee. *Mr. Oliver Gasch*, United States Attorney, also entered an appearance for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* This case is here for the second time. On the first appeal Green's conviction of second degree murder under the second count of an indictment, which count charged murder in the first degree done in the perpetration of arson,[1] was reversed. 95 U. S. App. [719] D. C. 45, 218 F. (2d) 856 (1955). Because "all the testimony as to what occurred in the burning house pointed to murder in the first degree and nothing else," this court held the trial judge erred in giving a second degree instruction. We were concerned, however, at the obvious risk Green was running in successfully appealing from the second degree murder conviction but were assured he was

[1] The first count charged arson only and will be noticed *infra*.

aware of it. With respect to this we said in the opinion, at page 48:

> ". . . In seeking a new trial at which—if the evidence is substantially as before—the jury will have no choice except to find him guilty of first degree murder or to acquit him, Green is manifestly taking a desperate chance. He may suffer the death penalty. At oral argument we inquired of his counsel whether Green clearly understood the possible consequence of success on this appeal, and were told the appellant, who is 64 years of age, says he prefers death to spending the rest of his life in prison. He is entitled to a new trial."

After remand, Green was tried again under the first degree murder charge. As the evidence was substantially the same as before, the trial judge of course did not instruct on second degree murder. This time the jury found him guilty of murder in the first degree, and he again appeals.

Counsel appointed to represent appellant have ably presented his case in briefs and in oral argument. They rely, first, on double jeopardy. Their theory is that when the jury at the first trial found Green guilty of murder in the second degree, it acquitted him of first degree murder; that he could not be tried again on a charge of which he had been acquitted, and his defense of former acquittal asserted at the second trial should have been sustained.

Where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial for the offense of which he was previously convicted. *United States* [720] v. *Ball*, 163 U. S. 662, 672 (1896); *Francis* v. *Resweber*, 329 U. S. 459, 462 (1947). This principal is not disputed by counsel. But the question here has an additional element and may be stated thus: Where one is convicted, not of the crime charged in the indictment under which he was tried but of a lesser included offense, and on his appeal the conviction is reversed and he is granted a new trial, may he be tried again for the crime charged in the indictment, or must the new trial be confined to the lesser offense of which he was first convicted?

This question was presented to the Supreme Court in *Trono* v. *United States*, 199 U. S. 521 (Dec. 4, 1905), a case

which arose in the Philippine Islands. Mr. Justice Peckham, who wrote the principal opinion, said, at page 530:

> "This question has given rise to much diversity of opinion in the various state courts. Many of them have held that the new trial must be confined to the lesser offense of which the accused had been convicted on the first trial, while other courts have held precisely the contrary, and that upon a new trial the whole case was open as if there had been no former trial. . . ."

After discussing some of the cases, Mr. Justice Peckham reached this conclusion, at pages 533-4:

> "In our opinion the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previousl, taken place. . . .
>
> ". . . When at his own request he has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case. . . ."

[721] Counsel for appellant say the Peckham *Trono* opinion is not that of the Supreme Court. They characterize it as "a four to four opinion, with Mr. Justice Holmes concurring only in the result reached by the first four . . ." Four justices did indeed dissent, and Mr. Justice Holmes was noted as "concurring in the result." The result flowed directly and solely from the Peckham conclusion that ". . . the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial . . ." If Mr. Justice Holmes had not thought that "the better doctrine," he could not have concurred in the result.

Moreover, some 18 months before the *Trono* decision, the distinguished Holmes had affirmatively asserted that to be

the better doctrine. Dissenting in *Kepner* v. *United States*, 195 U. S. 100, 134 (May 31, 1904), he said, at pages 135-6:

> "It might be said that when the prisoner takes exceptions he only is trying to get rid of a jeopardy that already exists—that so far as the verdict is in his favor, as when he is found guilty of manslaughter upon an indictment for murder, according to some decisions he will keep it and can be retried only for the less offense, so that the jeopardy only is continued to the extent that it already has been determined against him, and is continued with a chance of escape. I believe the decisions referred to to be wrong . . ."

We see no reason to suppose that 18 months later Mr. Justice Holmes had abandoned this view but nevertheless concurred in the *Trono* result which depended upon it.

So, whatever it was in the Peckham opinion with which the great justice did not agree, we are sure it was not Peckham's choice of "the better doctrine," a result in which he expressly concurred. Thus the Peckham holding which is applicable here must have been the holding of a majority of the Supreme Court. Probably that is why in the official [722] report it is said, at page 528, "Mr. Justice Peckham, after making the foregoing statement, delivered *the opinion of the court.*" [Emphasis supplied.] And why Mr. Justice Harlan, dissenting, referred, at page 536, to Peckham's opinion as "the opinion and judgment of the court . . ." And why in several subsequent citations the Supreme Court and lesser tribunals have so regarded it.[2]

Appellant's counsel insist the *Trono* decision set a precedent only for cases arising in the Philippines, and that it has no application here. They contend the Fifth Amendment's prohibition against double jeopardy did not extend to the Islands, and that therefore the *Trono* ruling has no application to continental cases involving the Amendment. This theory seems to us untenable. In the *Trono* case the Court was considering the effect of a Congressional enactment that in the Philippines "no person for the same offense shall be

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[2] E.g., *Burton* v. *United States*, 202 U. S. 344, 378 (1906); *Stroud* v. *United States*, 251 U. S. 15, 18 (1919); *Bryan* v. *United States*, 338 U. S. 552, 560 (1950); *Miller* v. *United States*, 224 F. (2d) 561, 562 (5th Cir. 1955).

twice put in jeopardy of punishment . . . ."[3] This is exactly the same as the double jeopardy provision of the Fifth Amendment, as the Court had held in the then recent case of *Kepner* v. *United States*, 195 U.S. 100 (1904).[4] Hence what the Court said in the *Trono* opinion with regard to the provision of the Philippine statute necessarily applied to the pertinent provision of the Fifth Amendment, which has identical significance. And Mr. Justice Holmes was of that opinion, for he said in his *Kepner* dissent, at page 134:

> [723] "'. . . The case is of great importance, not only in its immediate bearing upon the administration of justice in the Philippines, but, since the words used in the Act of Congress are also in the Constitution, even more because the decision necessarily will carry with it an interpretation of the latter instrument. . . .'"

Thus we see why the *Trono* opinion says, "We may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country. . . ." 199 U. S. at 530.

Counsel say this statement is *dictum;* that it is not and should not be binding on a federal court. Whether so or not, the statement was a deliberate expression of opinion which we think we may not disregard; moreover, it is one with which we agree. The *Trono* opinion's choice of "the better doctrine" with respect to the double jeopardy question under discussion was a ruling on a right not only guaranteed by the Philippine statute but also by the Fifth Amendment. We see no reason why it should not have general application wherever the Constitution reaches. We conclude that the *Trono* case is authoritative and requires us to hold that Green was not subjected to double jeopardy when, upon remand, he was tried for murder in the first degree.

But the reliance of diligent counsel upon the defense of former jeopardy does not stop with the plea of *autrefois*

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[3] Section 5 of an Act of July 1, 1902, 32 STAT., c. 1369, 691, 692, which extended to the Philippine Islands certain of our Constitutional guaranties.

[4] See also *Gavieres* v. *United States*, 220 U. S. 338, 341 (1911).

acquit which we have discussed and rejected in the foregoing portion of this opinion. They point out that at the first trial he was convicted under the arson count and did not appeal. Since there was only one act of arson, counsel say, "An unappealed conviction of arson bars subsequent prosecution for felony murder[5] arising out of arson." [724] The contention is based on *State* v. *Cooper*, 1 Green 361, 25 Am. Dec. 490 (N.J. 1833), which is said to have "established" the proposition for which counsel argue.

We cannot accept the *Cooper* case as binding authority. In *Carter* v. *McClaughry*, 183 U. S. 365, 395 (1902), and in *Gavieres* v. *United States*, 220 U. S. 338, 342 (1911), the Supreme Court quoted with approval the following excerpt from *Morey* v. *Commonwealth*, 108 Mass. 433, in which the Supreme Judicial Court of Massachusetts, speaking by Judge Gray, held:

> "A conviction or acquitttal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

Again, in *Morgan* v. *Devine*, 237 U. S. 632, 641 (1915), the Supreme Court said:

> ". . . [T]his court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges

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[5] They use this term to denote the crime committed by him who kills another in the perpetration or attempted perpetration of one of those felonies enumerated in the statute, which makes such a killing murder in the first degree.

> relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. . . ."

Following this, the *Carter* and *Gavieres* opinions were cited with approval.

"Applying these principles," the Supreme Court said in the *Gavieres* case, 220 U. S. at 343, "it is apparent that evidence sufficient for conviction under the first charge would not have convicted under the second indictment." [725] It is equally plain in the present case that evidence sufficient to convict Green of arson under the first count would not have convicted him of murder under the second, which required proof that the death of a human being was caused by arson. Hence, the conviction of arson did not preclude later prosecution for and conviction of murder committed in the perpetration of the arson.

Appellant's counsel invoke the *McNabb* rule[6] because certain statements Green made to police officers and a fire inspector while he was in a hospital and before he had been arraigned were used to contradict in some respects his testimony at the trial. There was no confession. We think it clear that the *McNabb* rule does not apply in this case but, as two of our dissenting colleagues think otherwise, we shall discuss the facts involved.

For some time prior to Tuesday, May 26, 1953, Miss Betty Brown, who was 83 years old and in ill health, had shared a house with and been cared for by the appellant. In response to an alarm, fire apparatus arrived at the house about 7:40 a. m. on that Tuesday. After breaking into the house, firemen not only discovered flames but also found Miss Brown dead in her bed, and found Green lying face down in a bathtub, suffering from superficial stab wounds on the upper part of his body and from inhalation of smoke.

After reviving Green with oxygen, the firemen removed him to Emergency Hospital, where he was received about 8:00 a. m. and was given medical attention. Police Sgt. Couture, who knew nothing about the facts except that

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[6] *McNabb* v. *United States*, 318 U. S. 332 (1943).

Green and Miss Brown's body had been found in the burning building, went to Emergency Hospital about 8:30 a. m. and asked him what had occurred. The officer later testified at the trial that Green, who was quite rational and "talked [726] good," told him he awoke about 7:00 a. m., smelled smoke, and went to the basement to investigate. There he was attacked, he said, by a tall, bald-headed colored man who stabbed him several times with a long dagger; that after a short interval of unconsciousness he (Green) dragged himself to the bathtub where the firemen found him.

Couture testified further that about 10:00 a. m. Tuesday he returned to Emergency Hospital accompanied by Sgt. Clark and again talked with Green. They asked him how he accounted for the fact that there were five separate fires, to which he replied that the colored man must have set them. Asked how the latter had escaped from the house that was so tightly closed the firemen had to break in, he offered no explanation. The officers had found pencils and an open box of stationery on a kitchen table; they asked Green if he had been writing letters, to which he replied he had not. Later that day, Tuesday, Green was taken in an ambulance from Emergency Hospital to District of Columbia General Hospital, where he was admitted at 2:10 p. m. and placed in a locked ward with about a dozen other patients. A policeman was on guard outside the door. About 3:00 p. m. Tuesday a fire inspector questioned Green, who told him substantially the same story he had recited to Sgts. Couture and Clark that morning at 10:00 o'clock. There was no further interrogation of the appellant on Tuesday, May 26, and none at all on Wednesday, May 27.

During the evening of Wednesday, May 27, a Mrs. Anthony, an acquaintance of Green, turned over to the police a letter from him which she had received in that day's mail, together with two $20.00 bills which had been enclosed with it. The envelope was postmarked Washington, D. C., May 26—12:30 p. m.—1953. The letter read:

> "Tuesday A. M. Please notify W. T. Thompson, Fredericksburg, Virginia, of Miss Betty Brown's death. [727] A fine and good lady, a true friend to me. We both want it this way. Good-bye, my friend. /s/ Everett.

"Please have my ashes thrown on the Chesapeake Bay. (Okay.) The inclosed is for flowers for her."

Because of the discovery of this letter, Sgts. Couture and Clark and the fire inspector returned to the General Hospital at 9:30 a. m., Thursday, May 28, and again interviewed Green. He readily admitted having written the letter to Mrs. Anthony, and explained it by saying he had gone to bed about midnight but was restless and at 12:30 a. m. (Tuesday, May 26) went to see how Miss Brown was. Finding she was dead, he contemplated suicide and wrote the letter to Mrs. Anthony, mailed it in a nearby box, and went to bed. He then repeated what he had previously said about going to the smoke-filled basement some hours later that morning and there meeting a colored man who attacked him. Shortly after this interview and at 11:00 a. m. Thursday, May 28, the medical authorities permitted the police to take Green from the hospital to the coroner, who conducted a preliminary examination and held him to await the action of the grand jury.

The statements attributed to Green by the police sergeants and the fire inspector in their testimony concerning the three interviews with him on Tuesday, and the fourth on Thursday morning, are those which appellant and two of our dissenting brothers say were received in violation of the *McNabb* rule. Green was not prejudiced by the admission of evidence concerning the Thursday morning statement in which he admitted writing the letter to Mrs. Anthony and explained it by saying it was written after he had discovered at 12:30 a. m. that Miss Brown was dead; for in his testimony at the trial he adhered to his Thursday morning statement.

This brings us to the three statements made by the appellant on Tuesday, the day of the fire. We observe that when [728] Green talked to Sgt. Couture at 8:30 that morning and to him and Sgt. Clark an hour and a half later, he had not been arrested, was not in the custody of the police, and was not under surveillance by them. He was in Emergency Hospital and there was no policeman there guarding him. It is thus apparent that, when the appellant made the two Tuesday morning statements, he not only was not being ille-

gally detained but was not being detained at all. As far as we can ascertain from the record, Green was not under police restraint until shortly before 2:00 o'clock Tuesday afternoon when he started the ambulance journey from Emergency to General, on which he was accompanied by a police officer and after which he was in the locked ward at General under police guard. In view of these facts, testimony concerning what Green said in the two Tuesday morning interviews, is not subject to attack under the *McNabb* rule.

The remaining statement, made to the fire inspector at 3:00 o'clock Tuesday afternoon, was made while Green was in custody. But, even if that custody were thought to be unlawful detention, evidence of his statement then made can scarcely be said to have prejudiced him; for the Tuesday afternoon statement was identical in all material respects with that appellant made that morning at 10:00 o'clock when he was not being detained, which was therefore unquestionably admissible.

Green testified he was not threatened or mistreated at any time by anybody, and made no claim that the statements he made in the four pre-arraignment interviews were induced by any form of coercion. His statements were not confessions. Evidence concerning them merely went to Green's credibility as a witness. There was no unlawful detention due to failure promptly to carry him before a committing magistrate. He was arraigned just as soon as the hospital authorities released him. Delay in arraigning a suspect caused by his necessary hospitalization can hardly be called illegal detention.

[729] Strong suspicion that Green had set the fires and that his wounds were self-inflicted with an ice pick to give credence to his story about a colored man attacking him with a "long dagger," arose from the fact that he was the only living person in the tightly closed house when the firemen arrived. But the police could hardly be expected to make a murder charge on that suspicion alone. It was not until Wednesday evening when they obtained the letter, written some hours before the death of Miss Brown,[7] that

[7] Uncontradicted medical testimony concerning the autopsy showed she died from inhaling hot irritating gases caused by the

a murder charge was justified. As the Supreme Court said in *United States* v. *Carignan*, 342 U. S. 36, 44-5 (1951), "This case falls outside the reason for the [*McNabb*] rule, *i.e.*, to abolish unlawful detention." We note also that the trial judge carefully charged the jury to disregard Green's pre-arraignment statements unless it believed to the exclusion of a reasonable doubt that they were voluntarily made.

Since there was neither coercion nor illegal detention, and no suggestion of inducement through promises, we hold that evidence of Green's pre-arraignment statements was properly received and that the *McNabb* rule does not apply.[8] [730] We have given careful consideration to the other reasons for reversal advanced by counsel but must reject them as insufficient. None appears to require discussion.

Affirmed.

PRETTYMAN, *Circuit Judge*, concurring: I concur in the opinion and judgment of the court but solely because of the opinion of the Supreme Court in the *Trono* case. I see no escape in this case from the law there laid down.

BAZELON, *Circuit Judge*, dissenting: Upon the ground stated in the opinion of Judge Fahy and upon the further ground stated below, I dissent from the judgment of the court.

Statements the police obtained by questioning appellant during the two days intervening between his arrest and his

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fire, which started about 7:00 a.m. Green claimed she was dead at 12:30 a.m. See *Green* v. *United States*, 95 U. S. App. D.C. 45, 218 F. (2d) 856 (1955), for a full statement of this testimony on this subject which was given at the first trial, and which was also given in practically the same form at the second trial with which we are now concerned.

[8] *Cf.* Judge Washington's concurring opinion in *Tillotson* v. *United States*, —— U.S. App. D.C. ——, 231 F. (2d) 736, 740 (1956), in the course of which he said:

> ". . . Clearly, lack of coercion alone—or lack of illegal detention alone—does not render a confession admissible. But where there is neither coercion nor illegal detention, and no suggestion of inducement through promises, the confession should be admitted. . . ."

arraignment were admitted in evidence against him.[1] Because appellant's injuries required his confinement in a hospital during this period, the majority holds there was no "illegal detention" within the meaning of Rule 5(a), F.R.CRIM.P., and hence the *McNabb* rule does not bar the statements. I cannot agree. I would hold the admission of the statements to be error warranting a new trial.[2]

[731] Rule 5, F. R. CRIM.P., requires arraignment "without unnecessary delay." " . . . what constitutes 'unnecessary delay,' *i.e.*, reasonable time within which the prisoner should be brought before a committing magistrate must be

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[1] Whether, prior to his transfer to the locked ward of the District of Columbia General Hospital, appellant had been placed under arrest or just happened to be fairly constantly attended by policemen and fire inspectors is not clear from the record. But from Tuesday afternoon to Thursday, he was under arrest and the statements here in question are those obtained from him during that period in interrogations by two policemen and two fire inspectors.

[2] That the appellant, in making the admissions in question neither intended nor purported to confess, does not prevent the application of the *McNabb* rule. The majority, indeed, although it notes that "there was no confession," finds *McNabb* inapplicable not on that account, but only because there was no "illegal detention." To the extent that Ercoli v. United States, 76 U.S.App.D.C. 360, 131 F.2d 354 (1942), dealing with the requirement of corroboration of extrajudicial admissions, is here relevant, it must be held to have been overruled in *Opper v. United States*, 348 U.S. 84 (1954). The Supreme Court pointed out that it is inconsequential whether the statements were made as a confession or for the purpose of exculpation, so long as they are "statements of the accused out of court that show essential elements of the crime . . ." *Id.* at 91. Regarding the contention of the Government (and our view in *Ercoli*) that admissions intended as exculpation should be excepted from the requirement of corroboration, the Court said: "This accords with Professor Wigmore's view [citing EVIDENCE (3d ed.) § 821; relied on by us in *Ercoli*, 76 U.S.App.D.C. at 362, 131 F.2d at 356, notes 6, 7 and 8]. The statements here are exculpatory. . . . There is no opinion of this Court declaring or declining such an exception. We conclude that exculpatory statements, however, may not differ from other admissions of incriminating facts. Given when the accused is under suspicion, they become questionable just as testimony by witnesses to other extrajudicial statements of the accused." *Id.* at 91-92.

determined in the light of all the facts and circumstances of the case."[3] Reasonableness of a delay of arraignment is, [732] therefore, a functional consideration which embraces not only the circumstances occasioning the delay but also the events transpiring in the course of it.

The most obvious of the "evil implications of secret interrogation"[4] is that the accused may be unaware of such matters as his right to have counsel and to refuse to answer questions, and the risk that any statement he makes may be used against him. Hence Rule 5(a) directs that an arrested person be taken "without unnecessary delay before the nearest available" committing officer, who "shall inform" the accused, as required by Rule 5(b), of the aforementioned matters *inter alia*.

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[3] Notes of Advisory Committee, Rule 5(a). The Supreme Court, speaking of the statutory predecessors of Rule 5, said in McNabb v. United States, 318 U.S. 332, 343-44 (1943):

> "The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. *It aims to avoid all the evil implications of secret interrogation of persons accused of crime.*" (Emphasis supplied.)

[4] *Supra* note 2.

The rule was promulgated because failure to arraign promptly "was thought to give opportunity for improper pressure by police before the accused had the benefit of the [733] statement by the commissioner."[5] Opportunity for such pressure is present whenever the arrested person "is under the exclusive control of the police, subject to their mercy, and beyond the reach of counsel or of friends."[6]

That the delay in arraigning appellant was unavoidable did not diminish the opportunity for pressure. The secrecy of appellant's interrogation—and hence its evil implications—could have been no greater if the delay had been deliberately planned by the police. Hence, if the evil implications of secret interrogation are to be avoided, in a case where delay of arraignment cannot be avoided, it is at least indispensable that the police give the accused substantially that advisory information which the committing officer would give him at the arraignment.[7] The practice of thus advising arrested persons has been prescribed by rule of court in England at least since 1912[8] and was used by "the respectable officer" in this country as long as half a century [734] ago.[9] That this is consistent with proper and efficient

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[5] United States v. Carignan, 342 U.S. 36, 45 (1951).

[6] Mr. Justice Douglas, concurring in United States v. Carignan, *id.* at 46. In Watson v. United States, — U.S.App.D.C. —, — F.2d — (No. 12673, decided May 3, 1956), the court had occasion to comment on the police practice of keeping a prisoner secreted from lawyers. See note 11 of my dissenting opinion in Mallory v. United States, — U.S.App.D.C. —, —, — F.2d —, — (No. 12915, decided this day).

[7] Cf. Pixley v. United States, 220 F.2d 912, 913 (10th Cir. 1955), holding a two-day delay of arraignment not improper where the accused was immediately warned that "he did not have to make a statement; that any statement he might make could be used against him; and that he was entitled to an attorney . . ."; also, Haines v. United States, 188 F.2d 546 (9th Cir. 1951), *cert. denied*, 342 U.S. 888 (1951), approving the admission in evidence of statements obtained through two interrogations, each of which was preceded by the equivalent of a Rule 5 advisory statement.

[8] McNabb v. United States, 318 U.S. at 345 n. 9, and authorities there cited; see also 3 WIGMORE, EVIDENCE (3d ed.) 294-98.

[9] Major Sylvester, Washington Chief of Police, President of International Association of Chiefs of Police, Proceedings of 17th Annual Meeting (1910) 54, quoted in 3 WIGMORE, EVIDENCE (3d ed.) 316, 317.

police work is clear from the statement of J. Edgar Hoover, Director of the Federal Bureau of Investigation, that:

> . . .. Special Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice.[10]

Since there is no showing here of any circumstances to mitigate the evils of appellant's secret interrogation, I would apply the salutary requirements of Rule 5 and hold that *McNabb* bars the statements made pursuant to police interrogations during the period of delay. "A statute [or a rule] carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application."[11]

It is said that the admission in evidence of the statements obtained through secret interrogation of the appellant resulted in no prejudice to him. Such a conclusion can be reached only when "the conviction is sure that the error did not influence the jury, or had but very slight effect . . . ." *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946). Having no such sure conviction,[12] especially in the light of the

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[10] Hoover, *Civil Liberties and Law Enforcement*, 37 IOWA L.R. 175, 182 (1952).

[11] McNabb v. United States, 318 U.S. at 344.

[12] Sergeant Couture testified that appellant told him on Thursday that he had written and mailed the letter to Mrs. Anthony "just prior to his detecting the order of smoke." That time was fixed by all the evidence, including appellant's own testimony, at about 7:00 a.m. That statement vitally contradicts the story appellant told at the trial: that he had found Miss Brown dead at about 12:30 a.m.; that, in a fit of despondency he had immediately written the letter and mailed it before 1:00 a.m.; that then, deciding to wait until morning before calling anyone to take care of the body, he went back to bed; that when he arose at about 7:00 a.m., even before he was fully dressed, he detected smoke and, going to investigate, was attacked and knocked senseless. If the jury believed that appellant had gone out to mail a letter at 7:00 a.m., as Sergeant Couture said appellant had admitted, then appellant's whole story must, or could, have become incredible.

[735] fact that this is a capital case, I am unable to agree that the error was not prejudicial. Cf. *Anderson* v. *United States*, 318 U.S. 350, 356-57 (1943).

I am authorized to say that Edgerton, *Chief Judge*, joins in this dissent.

FAHY, *Circuit Judge*, dissenting: Green was first tried for arson and for murder in the first degree while committing arson. He was convicted of arson and of second degree murder. This result constituted an acquittal of first degree murder. *Trono* v. *United States*, 199 U.S. 521, 529-30, and see p. 538, dissenting opinion of Mr. Justice McKenna. He appealed only from the judgment of conviction of second degree murder.[1] *Green* v. *United States*, 95 U.S. App. D.C. 45, 46, 218 F.2d 856, 857. We there reversed that conviction. That appeal did not bring to this court his acquittal of first [736] degree murder.[2] Accordingly his appeal did not waive his constitutional right not to be placed in jeopardy a second time for first degree murder. U.S. Const. amend. VI. Therefore I think he could not be tried again for first degree murder. I do not think *Trono* v. *United States*, 199 U.S. 521, requires us to hold otherwise. For the *Trono* case arose in the Philippine Islands where Trono's conviction for a lesser offense than that for which he was indicted and first tried was appealed to the Supreme Court of the Philippines under procedures which permitted the whole case to be reviewed and tried *de novo* in the appellate court. *Trono* v. *United States*, *supra* at 534; *United States* v. *Berry*, 5 Phil. Rep. 409; *United States* v. *Clemente*, 24 Phil. Rep. 178; *cf. Kepner* v. *United States*, 195 U.S. 100; *United States* v. *Atienza*, 1 Phil. Rep. 736; *United States* v. *Abijan*, 1 Phil. Rep. 83; *United States* v. *Padilla*, 4 Phil. Rep. 511; *United States* v. *Flemister*, 4 Phil. Rep. 300, 5 Phil. Rep. 650; *United States* v. *Noriega*, 31 Phil. Rep. 310, 314; *United States* v. *Tamparona*, 31 Phil. Rep. 321, 328; *United States* v. *Gimenez*, 34 Phil.

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[1] His notice of appeal, apparently in his own handwriting, in terms applied to arson as well as second degree murder. But in presenting the case in this court both the United States and appellant represent that the appeal was only from that part of the judgment which covered the conviction of second degree murder.

[2] Nor, apparently, did it bring to this court his conviction of arson. See note 1 *supra*. Our prior decision, *Green* v. *United States*, *supra*, did not consider the arson conviction.

Rep. 74, 77. So that when Trono took his appeal, in his effort to obtain acquittal entirely, he waived his acquittal of the more serious offense. Therefore he could be again put in jeopardy with respect to it. No comparable situation governed Green's previous appeal, and I think we should apply the prevailing rule at common law which would have precluded his second trial for the greater offense of which he had been acquitted. See cases cited in *Trono* by Mr. Justice McKenna, 199 U.S. at 540 n.1. It is true that in *Trono* the opinion of Mr. Justice Peckham, for himself and for Mr. Justice Brewer, Mr. Justice Brown and Mr. Justice Day went further, and its language if applied to Green's case would require a conclusion contrary to that I state; but since [737] that opinion did not have the adherence of a majority of the Court, and since also the situation in the Philippines differed materially from that here, I believe with all deference that we are free to apply to Green's case principles which do not accord with all that is said in Mr. Justice Peckham's opinion in *Trono*.

I am authorized to say that Chief Judge Edgerton and Circuit Judge Bazelon join in this dissent.

[738] [Filed endorsement omitted].

In United States Court of Appeals for the District of Columbia Circuit

No. 12,809

Criminal 1083-53

EVERETT D. GREEN, Appellant

v.

UNITED STATES OF AMERICA, Appellee

On Rehearing En Banc.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges.

JUDGMENT—June 28, 1956

This cause came on to be reheard before the Court en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On consideration whereof, it is ordered and adjudged by this Court en banc that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Circuit Judge Wilbur K. Miller.

Dated: June 28, 1956.

Circuit Judge Prettyman concurs in the opinion and judgment of the Court solely because of the opinion of the Supreme Court in the *Trono* case.

Separate dissenting opinion by Circuit Judge Bazelon, in which Chief Judge Edgerton joins.

Separate dissenting opinion by Circuit Judge Fahy, in which Chief Judge Edgerton and Circuit Judge Bazelon join.

[739] United States Court of Appeals for the District of Columbia Circuit

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Clerk's certificate to foregoing transcript omitted in printing.

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[740] Supreme Court of the United States, October Term, 1956

No. 172 Misc.

EVERETT D. GREEN, Petitioner,

vs.

UNITED STATES OF AMERICA

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia Circuit.

ORDER ALLOWING CERTIORARI—November 19, 1956

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 589.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~583~~ 46

EVERETT D. GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 589

EVERETT D. GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

No opinions were written by the United States District Court for the District of Columbia. The opinion of the United States Court of Appeals for the District of Columbia Circuit following Petitioner's appeal from a conviction of second-degree murder is reported at 95 U.S. App. D.C. 45, 218 F.2d 856 (1955), and appears at R. 7. An opinion of a division of three Judges of the United States Court of Appeals for the District of Columbia Circuit on Peti

tioner's appeal from his conviction of first-degree murder dated February 9, 1956, was vacated on April 3, 1956, and withdrawn on June 28, 1956. The opinion of that court, on rehearing *en banc*, is reported at 98 U.S. App. D.C. 413, 236 F.2d 708 (1956), and appears at R. 172.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). The judgment of the United States Court of Appeals for the District of Columbia Circuit, on rehearing *en banc*, was entered on June 28, 1956. R. 189. The petition for writ of certiorari was filed on July 27, 1956. A brief in opposition was filed by respondent on September 27, 1956. Certiorari was allowed on November 19, 1956. R. 190.

Constitutional Provisions and Statutes Involved

1. The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb."

2. Section 401 of Title 22 of the District of Columbia Code (1951) provides, in pertinent part:

> "Whoever shall maliciously burn or attempt to burn any dwelling, or house, * * * the property, in whole or in part, of another person, * * * shall suffer imprisonment for not less than one year nor more than ten years."

3. Section 2401 of Title 22 of the District of Columbia Code (1951) provides, in pertinent part:

> "Whoever, being of sound memory and discretion, * * * without purpose so to do kills another in per-

petrating or in attempting to perpetrate any arson, as defined in section 22-401, * * * of this Code, * * * is guilty of murder in the first degree."

4. Section 140 of Title 4 of the District of Columbia Code (1951) provides:

"The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District, but such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law."

5. Rule 5 of the Federal Rules of Criminal Procedure provides, in pertinent part:

"(a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

"(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall

also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The comissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

6. Rule 31(c) of the Federal Rules of Criminal Procedure provides:

"The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

7. Rule 52(b) of the Federal Rules of Criminal Procedure provides:

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Questions Presented

I-A. Where Petitioner's conviction of an offense unrelated to but lesser in degree than that charged in the indictment was upon review determined to be unjust, whether the divided court below properly held that Petitioner's appeal deprived him of his Constitutional right not to be put in second jeopardy for the greater offense of which he had not been found guilty at his first trial.

I-B. Whether Petitioner's unappealed conviction of the lesser included offense of arson should not have barred subsequent prosecution for killing another while perpetrating that arson.

II. Where Petitioner had been questioned in custody for

two and one-half days before he was advised of his rights and before his detention had been sanctioned by a committing magistrate, whether the majority of the court below properly held that the evil implications of secret interrogation thus raised were refuted by the fact that Petitioner was injured and in need of hospitalization.

III. Whether prosecution assurances to a jury in a capital case that theirs is not the final responsibility for finding the facts are compatible with the standards of fairness that should be maintained in a federal court.

Statement

Petitioner was first brought to trial on February 8, 1954, on an indictment in two counts. R. 2-3. The first count alleged that on or about May 26, 1953, Everett D. Green maliciously did burn, and cause to be burned, a certain building known as 1115 Massachusetts Avenue, Northwest, the property of another. This count therefore charged the offense of arson under D.C. Code, §22-401. The second count of the indictment alleged that Everett D. Green committed the offense of arson, "and in perpetrating the offense of arson aforesaid, caused Bettie Brown to inhale certain gases, the inhalation of which resulted in her death, within the District of Columbia, on or about May 26, 1953." Thus the second count charged Petitioner with the offense of first-degree murder under D.C. Code, §22-2401, in addition to the offense of arson. To this indictment the accused pled not guilty. R. 3. On February 10, 1954, the jury returned a verdict of guilty of arson on the first count and guilty of second-degree murder on the second count. R. 4. On March 19, 1954, the court adjudged the Petitioner guilty of arson and of second-degree murder and committed him to the custody of the Attorney General for imprisonment for a period of one to three years on the first count and five

to twenty years on the second count, to run concurrently with the sentence imposed on count one. R. 4-5. Since Petitioner did not appeal his conviction of arson under the first count of the indictment (R. 8, 19, 178, 187, n. 1, 2), he will have served the full term of his sentence on this count on March 18, 1957.

Petitioner did appeal from his conviction of murder in the second degree under the second count of the indictment. R. 6, 8. This conviction was reversed by the United States Court of Appeals for the District of Columbia Circuit on January 20, 1955. *Green* v. *United States*, 95 U.S. App. D.C. 45, 218 F. 2d 856 (1955). R. 7-13.

Once it appeared that the Government intended to prosecute Petitioner a second time on the second count of the same indictment, he moved to dismiss the indictment on the ground that he had been once in jeopardy for the offense of murder in the first degree under D.C. Code, § 22-2401. R. 15-16. This motion was filed in the United States District Court for the District of Columbia on April 8, 1955, and was argued on April 22 and 29, 1955, before The Honorable F. Dickinson Letts. Judge Letts denied the motion on April 29, 1955. R. 17. This motion was renewed on May 16, 1955, before the jury was impaneled (R. 18), and was again renewed at the conclusion of the Government's case on May 18, 1955. R. 138. The motions, as renewed, were denied. R. 18, 138.

On May 19, 1955, the second jury returned a verdict of guilty of murder in the first degree. R. 156-158. On the day following, Petitioner moved for a judgment of acquittal (in which he alleged error in the denial of his motion to dismiss the indictment) and, in the alternative, moved for a new trial. R. 158-159. These motions were denied by the court in an order entered on June 10, 1955. R. 160. The court adjudged the defendant guilty of murder in the

first degree on June 17, 1955, and imposed the mandatory sentence of punishment of death by electrocution. R. 160-161. Notice of appeal was filed on June 17, 1955. R. 162. Following a decision on February 9, 1956, by a division of three judges of the United States Court of Appeals for the District of Columbia Circuit, since vacated and withdrawn, petition for rehearing by the Court *en banc* (R. 163-171) was granted on April 3, 1956. The judgment was affirmed on June 28, 1956, by a divided court. R. 172-189.

Prior to May 26, 1953, Petitioner and a lady of 83 years, Betty Brown, shared a house at 1115 Massachusetts Avenue, Northwest. At approximately 7:30 A.M. on this date, the house was found to be on fire. R. 20. Soon after arriving at the scene, firemen discovered that both Everett D. Green and Betty Brown were in the house. Both were carried out. R. 21, 44, 108. Miss Brown was pronounced dead soon after, and Green was taken to Emergency Hospital by ambulance. R. 83.

While there was evidence that Miss Brown's blood was 14 percent saturated with carbon monoxide (R. 29), this was recognized by the chemist as a very low percentage. R. 30. And Dr. Rosenberg, the Deputy Coroner, admitted that the symptoms of from 10 to 20 percent saturation were ordinarily mild and might be absent. R. 31. The presence of carbon monoxide would indicate, however, that Miss Brown was alive at the time of the fire. R. 31. Still, the cause of her death was not clear. Dr. Rosenberg's examination disclosed that her heart was markedly degenerated and diseased (R. 28, 34); that there was a generalized arteriosclerosis (R. 28); and that this condition was a contributing factor in her death. R. 28, 35, 36. Pulmonary edema, identified as the chief cause of death (R. 35), was

shown to be a very frequent accompaniment of heart failure. R. 36. The brain was found to be congested and edematous and there were tiny hemorrhages through the brain (R. 32), a condition which would make it possible for Miss Brown to have had a stroke. R. 33. All of the organs of her body were degenerated and fibrotic. R. 34. The condition of the kidney might have caused death at any time. R. 33-34. In view of what the Deputy Coroner had found with regard to the heart and considering that a serious heart condition and a diseased kidney are very frequently found together (R. 34), there was evidence to warrant a finding that Miss Brown died from heart failure or other cause coincidentally with the fire. The jury, however, accepted the opinion of Dr. Rosenberg that the pulmonary edema was caused by the inhalation of hot gases produced by the fire. R. 36-37.

The accused, who was found unconscious in the basement of the house (R. 21, 27), suffered from smoke inhalation (R. 64) and several stab wounds on his chest and neck. R. 63. These wounds, which evidently had been inflicted by an ice pick found with blood up to the hilt (R. 132), were described as superficial by the Government's medical witness. R. 64. Police questioning began shortly after his admission to Emergency Hospital and before his wounds had been treated. R. 83, 85, 87-91, 117-118. Green was not then or at any time informed that he was not required to make statements, that any statements he did make might be used against him, or that he had a right to counsel. R. 94. The accused was questioned three different times on May 26 by police and fire department inspectors, both at Emergency Hospital and at the guarded ward of D. C. General Hospital. R. 98-104, 110-112, 118-119, 126-127, 137-138; 43-53, 68-80, 147-148. He was again questioned on May 28 (R. 78, 113-114, 130), shortly before being taken to the

Coroner's Inquisition at the D. C. Morgue. R. 64. The Coroner committed Green to the Washington Asylum and Jail to await Grand Jury action. R. 1-2.

The statements taken from Green prior to his commitment were admitted in evidence against him.

The District Attorney, in his closing argument, assured the members of the jury that the United States Court of Appeals had "a responsibility to sift the facts and look them over and decide whether this man will go to the electric chair." R. 154. *This Court*, he added, "can look these facts over and decide if this man goes to the electric chair." R. 154. And if this Court should so decide, "there is the President of the United States who may look these facts over" (R. 154), and "there is the Attorney General of the United States, who may make recommendations to the President of the United States relative to this sentence." R. 154. The District Attorney concluded that "the consequences or the result of your verdict is something that you are not concerned with or should be concerned with." R. 155.

Summary of Argument

I

Petitioner was tried upon an indictment charging, in two counts, arson and killing another while perpetrating that arson. "Found guilty of arson under the first count and of murder in the second degree under the second count," Green appealed "only from the latter." *Green v. United States*, 95 U.S. App. D.C. 45, 218 F. 2d 856 (1955). The United States Court of Appeals for the District of Columbia Circuit agreed that there was no evidence in the record of murder in the second degree and that the trial judge erred to Green's prejudice in submitting the question of second-degree murder to the jury.

Petitioner's objections, on grounds of former jeopardy, to his retrial on the higher charge defined in the original indictment were overruled by the trial court. Found guilty, he was sentenced to death.

The divided court below, on rehearing *en banc*, held that Petitioner's appeal of the erroneous conviction of second-degree murder, a conviction of an offense unrelated to that charged in the indictment and without foundation in the evidence, presumptively waived the Constitutional bar against retrial for felony murder. It thus upheld the mandatory sentence of death imposed by the trial court following his second trial.

The common law, evidenced by the overwhelming weight of American decided cases, did not attach such conditions to the exercise of the right of an accused to seek appellate review of a conviction which he regarded as unjust. Thus, while permitting a new trial for the offense of which the accused was convicted, the appellant was not presumed to have waived his defense of former jeopardy against retrial for a greater offense for which he had been tried and not convicted.

In abrogating the common law rule and holding that one who appeals his conviction of a lesser but unrelated offense is "manifestly taking a desperate chance," the majority of the court below mistakenly regarded an opinion of four justices of this Court (with whose result in that particular case Mr. Justice Holmes concurred) in *Trono* v. *United States*, 199 U.S. 521 (1905), as determinative of the question presented in the instant case.

For Trono was tried in the Philippine Islands where, under the residue of Spanish criminal procedure, the appellate court was empowered to substitute its own findings of fact for those of a trial magistrate. Petitioner, on the other hand, was tried in a Federal court before a jury.

Moreover, Trono appealed from his conviction of an offense necessarily included in the offense charged. Petitioner, on the other hand, did not appeal his conviction of the only necessarily included offense of arson, which still stands, but only appealed his conviction of an offense which, under the applicable District of Columbia statute, was not covered in his indictment.

While the offense of second-degree murder is not one necessarily included in the District of Columbia felony murder statute, D.C. Code, § 22-2401, it is obvious, both from the statute and from the indictment in the instant case, that the felony enumerated in the statute is. Rule 31(c) of the Federal Rules of Criminal Procedure provides that "the defendant may be found guilty of an offense necessarily included in the offense charged." Such was the offense of arson in the instant case. Unlike Trono, who appealed the whole judgment against him, Petitioner did not appeal the portion of the judgment convicting him of arson and has served his sentence thereon. It was accepted at common law that an unappealed conviction of such a lesser-included offense bars subsequent prosecution for the greater.

Thus, whether regarded as a plea of *autrefois acquit* or one of *autrefois convict*, Green's timely motion to dismiss the indictment following reversal of his second-degree conviction should have been granted.

II

Petitioner was taken from a burning house, unconscious and suffering from numerous ice pick wounds in his chest and neck. Within an hour, and before his wounds had been treated, he was questioned by a detective attached to the Homicide Squad. He was interrogated a second time by police on the same morning and a third time by inspectors of the Fire Department after his removal to the "strong

room" at the District of Columbia General Hospital that afternoon. He was again interrogated by officers of both departments shortly before his arraignment; nearly two and one-half days later. It appears that at no time was the defendant advised that he was not required to make a statement, that any statement made by him might be used against him, or that he had a right to counsel. Isolated from contact with friends or counsel, Petitioner made numerous statements which, when introduced at his trial, constituted an affirmative and vital part of the Government's case against him. The majority below refused to apply the exclusionary rule of evidence formulated by this Court in *McNabb* v. *United States*, 318 U.S. 332 (1943), on the ground that "delay in arraigning a suspect caused by his necessary hospitalization can hardly be called illegal detention." R. 181. The instant case presents the question whether police are to be permitted to exploit the circumstances attending a suspect's need for hospitalization by keeping him behind bars and engaging in prolonged and secret interrogation without advising him of his Constitutional and other rights.

III

Allegedly, either in desperation or completely inadvertently, Petitioner caused the death of an elderly woman who had been his only friend and companion for years. Since she was an invalid, the accused nursed and provided for her and celebrated her birthdays with jello and pound cake. R. 79-80. When, believing her dead, he contemplated suicide, he enclosed the last of his money for flowers for her funeral. R. 180. The District Attorney, recognizing that it would be impossible to persuade any member of the jury that the defendant was a blackguard, appealed for a conviction by informing the jury that they should not be concerned with the consequences of their verdict. R. 155. He

assured them in his closing argument that the United States Court of Appeals had a responsibility to sift the facts and look them over and decide whether the sentence of death (mandatory in the District of Columbia) was to be imposed; that the Supreme Court of the United States, if it saw fit, could look the facts over and decide if the defendant was to go to the electric chair; that the President of the United States might look the facts over and commute the sentence, and finally that the Attorney General might make recommendations to the President relative to the sentence.

These remarks and others were far removed from the minimum standards of fairness required of prosecuting attorneys in the Federal courts, and were grossly prejudicial to the accused.

ARGUMENT

I. Appellate Review in Criminal Cases Should Not Be Conditioned upon the Waiver of a Fundamental Constitional Right.

Petitioner was tried upon an indictment charging, in two counts, arson and killing another while perpetrating that arson. "Found guilty of arson under the first count and of murder in the second degree under the second count," Green appealed "only from the latter." *Green* v. *United States*, 95 U.S. App. D.C. 45, 218 F.2d 856 (1955). R. 8. The United States Court of Appeals for the District of Columbia Circuit agreed with Green that there was no evidence in the record of murder in the second degree and that the trial judge erred to Green's prejudice in submitting the question of second degree murder to the jury [1] since, "had the erroneous instruction under which he was convicted not been given, Green might have been found not

[1] "Whether it was error to give that instruction depends on whether there was evidence to justify it; . . ." R. 8. The instruction on felony murder given at the first trial was correct.

guilty under the second count." *Green* v. *United States*, *supra*, at R. 12.

Petitioner's objections, on grounds of former jeopardy, to his retrial on the higher charge defined in the original indictment were overruled by the trial court. (R. 15-17, 18, 138, 158, 160. Found guilty, he was sentenced to death. R. 157-158, 160-161.

The divided court below, on rehearing *en banc*, held that Petitioner's appeal of the erroneous conviction of second-degree murder, a conviction unrelated to the indictment or the evidence, deprived him of the protection he would otherwise have been afforded by the Fifth Amendment, which provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb.

In affirming Petitioner's conviction of first-degree murder following reversal of his conviction of the lesser, but unrelated degree of murder, the majority of the court below relied upon an opinion of four justices of this Court over fifty years ago. *Trono* v. *United States*, 199 U.S. 521 (1905). This Court was there presented with the question whether the Audiencia (the highest court in the Philippines), in reversing the trial magistrate's finding of guilty of assault and substituting its own finding of guilty of homicide, violated Section 5 of an act for the government of the Philippine Islands, 32 Stat. 691. Under that act both assault and homicide were lesser offenses included in the offense of murder. 199 U.S. at 522. The four justices of this Court, with whose result Mr. Justice Holmes concurred, said that one who appeals "thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed." 199 U.S. at 533.

Five of the nine judges below thought that the *Trono* doctrine should be extended to a case arising within the

territorial limits of the United States, and regarded it as determinative of the defendant's appeal. R. 172. One judge below concurred solely because he saw "no escape in this case from the law there laid down." R. 182. Three judges of the court below thought that they "should apply the prevailing rule at common law which would have precluded his second trial for the greater offense of which he had been acquitted." R. 188.

The common law, evidenced by the overwhelming weight of American decided cases,[2] does not put a price tag on the exercise of the right to appeal. Thus, in our time, as in Blackstone's,[3] retrial following successful recourse to the appellate courts is limited to that offense of which the accused had been previously convicted. The reason for this, as stated by the minority of this Court in *Trono* v. *United States, supra*, at 538-539, is that it is absolutely unrealistic to suppose that the defendant did purposely and consciously

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[2] A total of twenty-three state courts agree that a new trial, in the absence of statute or constitutional provision declaring the effect of the judgment's reversal, must be restricted to a retrial of the charge upon which the accused was convicted, or one of lesser degree. Opposed to this interpretation of the common law rule forbidding second jeopardy for the same offense are decisions in only eight states, two of which found it expedient to overrule earlier cases which expounded the limited waiver doctrine. Eleven of the remaining state courts found that the decision had already been made for them by the state legislature or constitutional convention. So far as research discloses, the problem has not arisen in six states. See Appendix A.

[3] "If the prisoner is convicted on one count of an indictment and acquitted on another, and then obtains a new trial, he is only tried afterwards on the count on which he was before convicted." 2 Cooley's *Blackstone* 498, n. 15 (3d Ed. 1884).

"And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held, that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment of murder, for the fact prosecuted is the same in both, though the offenses differ in colouring and in degree." 4 Blackstone's *Commentaries* * 336.

waive his right to avail himself of an acquittal of the greater offense of which he was not found guilty:

> "The life and liberty of the citizen are precious things—precious to the State as to the citizen, and concern for them is entirely consistent with a firm administration of criminal justice. I submit that the State seeks no convictions except in legal ways, and because it does not it affords means of review of erroneous rulings and judgments, and freely affords such means. It does not clog them with conditions or forfeit by their exercise great and constitutional rights. Yet in my judgment such is the effect of the decision just rendered.
>
> "The opinion says that as the accused takes up the whole record for review, 'he thereby waives the benefit of the provisions in question (once in jeopardy) for the purpose of attempting to gain what he thinks is a greater benefit, viz., a review and reversal by the higher courts of the judgment of conviction.' I repeat again, that constitutional guarantees and statutory remedies should not be put in such barter; that a defendant should not be required to give up the protection of a just (it must be so regarded for the sake of the argument) acquittal of one crime as the price of obtaining a review of an unjust conviction of another crime."

While Mr. Justice Holmes concurred in the result reached by the Court in *Trono*, it may be noted that he had no sympathy for the waiver theory advanced by Mr. Justice Peckham. Thus, dissenting the year before in *Kepner* v. *United States*, 195 U.S. 100 (1904), Mr. Justice Holmes said at page 135:

"It cannot matter that the prisoner procures the second trial. In a capital case, like *Hopt* v. *People*, a man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights. *Thompson* v. *Utah*, 170 U.S. 343, 353, 354. Usually no such waiver is expressed or thought of. *Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.*" (Emphasis added.)

It is true that a successful appellant may be retried for the offense of which he was previously convicted. This exception to the Constitutional prohibition against second jeopardy was formulated so as to give effect to the intention and best interests of the accused, who at one time was said to have no right of appeal whatsoever since any further proceedings following reversal of his conviction would place him twice in jeopardy. See *United States* v. *Gibert*, 25 Fed. Cas. 1287, No. 15, 204 (1834). No such rea[illegible] exists for extending the scope of the waiver to the situation presented here. Our system of justice is such that taking an appeal should not be "manifestly taking a desperate chance," as five judges of the court below described Green's effort to obtain review and reversal of his conviction of the lesser, but unrelated, offense. See *Green* v. *United States*, *supra*, at R. 173.[4]

The action of the court below is without precedent. Not only is it the first time that a Court of Appeals has extended

[4] While it is true that petitioner's counsel was questioned at the first appeal as to whether petitioner understood the possible consequences of a successful appeal, and while it is true that petitioner did understand the possible consequences, his counsel then suggested to the Court that any effort to retry petitioner upon the same indictment would raise a problem of double jeopardy. R. 164, 169.

the *Trono* decision to a case arising in a Federal court in the United States, but it is the first time that any Federal court has attached *Trono* consequences to the appeal of a conviction unrelated to the offense originally charged and tried. In so doing the court below has gone farther than this or any other Federal court. See Appendix B.[5]

The three judges of the court below who dissented found the *Trono* decision sufficiently distinguished from the instant case by the fact that it arose in the Philippines "under procedures which permitted the whole case to be reviewed and tried *de novo* in the appellate court." R. 187.[6]

There was no tradition of a common law jury in the Philippine Islands. Appellate courts had few reservations about substituting their findings of fact for those of the trial magistrate. Indeed, that a trial magistrate might have the power finally to acquit a notorious criminal was unthinkable to Mr. Justice Brown, who cast a deciding vote in *Trono*. This is evident from his dissent the year before in *Kepner v. United States*, 195 U.S. 100, 137 (1904):

> By that law, in which trial by jury was unknown, the jeopardy did not terminate, if appeal were taken to the

[5] This includes the military. Article 63(b) of the Uniform Code of Military Justice, 50 U.S.C.A. § 650(b), provides that upon rehearing before a court-martial "the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed. . . ." To apply *Trono* in the instant case would deny a civilian tried in a Federal district court the protection he would have were he a soldier before a court-martial.

[6] Challenging the proposition that the Constitution followed the flag, an eminent authority has thus described the degree to which Constitutional restrictions were made applicable to insular governments:

> "The doctrine has been sufficiently elastic to permit of a government which, while maintaining the essentials of modern civil liberty, has not attempted to impose upon the new peoples certain ancient Anglo-Saxon institutions for which their history had not adapted them." Coudert, *Doctrine of Territorial Incorporation*, 3 *Selected Essays on Constitutional Law* 500, 526 (1938).

> audiencia or Supreme Court, until that body had acted upon the case. The proceedings before the court of first instance were in all important cases reviewable by the Supreme Court upon appeal. . . . It seems to me impossible to suppose that Congress intended to place in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals."

Had not Mr. Justice Brown so distrusted the integrity of the findings of fact of a Philippine trial magistrate, sitting without a jury, the decision in *Trono* would have been different, and the majority of the court below would not have felt constrained to strike from the Fifth Amendment one of the common law safeguards of individual rights there embodied. There is no question that the draftsmen of the Bill of Rights intended to preserve the power of a common law jury in the United States finally to acquit. *Palko* v. *Connecticut*, 302 U.S. 319 (1937).

The restrictions *in favorem libertatis* imposed on the Federal courts by the Bill of Rights were not made wholly applicable to state governments. See, *e.g.*, *Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937); *Maxwell* v. *Dow*, 176 U.S. 581 (1900); *La. ex rel. Francis* v. *Resweber*, 329 U.S. 459, 462 (1947).

> "The judicial history of the Fifth Amendment in prohibiting any person from being 'subject for the same offence to be twice put in jeopardy of lime or limb' serves as a good pragmatic confirmation of the compelling reasons why the original Bill of Rights was found to limit the actions of the Federal Government and not those of the States. The conflicting views expressed in *Ex parte Lange*, 18 Wall. 163; *Kepner* v. *United States*, 195 U.S. 100; *Trono* v. *United States*,

This would appear to be the general practice. See *Proceedings, International Association of Chiefs of Police*, 54 (1910), quoted in 3 Wigmore, *Evidence* 316-317 (3d ed. 1940).

It is difficult to find a conscious and intelligent waiver of the Constitutional privilege to refrain from incriminating oneself where the accused is surrounded by police, isolated from contact with friends or counsel, and ignorant of the purpose of the questioning to which he is subjected. Even if the police cannot, because of the physical condition of the accused, or for other legitimate reason, bring him before a committing magistrate "without unnecessary delay" under Rule 5(a), this does not excuse police disregard of the legislative command in Rule 5(b) that a person under arrest be advised of his Constitutional rights and his right to counsel, rights which have been aptly described as "guides to the exercise of free will." *Cf. Nelson* v. *United States*, 93 U.S. App. D.C. 14, 21, n. 19, 208 F.2d 505, 512, n. 19, *cert. denied*, 346 U.S. 827 (1953).

III. Prosecution Assurances to a Jury in a Capital Case That Theirs Is Not the Final Responsibility for Finding the Facts Are Incompatible With the Standards of Fairness That Should Be Maintained in a Federal Court.

While this Court has declared that the jury "alone is charged with the consideration and decision of the facts of a case," *Schaefer* v. *United States*, 251 U.S. 466, 476 (1920), and while this Court has reversed a conviction to rebuke a prosecuting attorney who "overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer," *Berger* v. *United States*, 295 U.S. 78, 84 (1935), the instant case presents the question whether a prosecutor's appeal to a jury mini-

199 U.S. 521; *In re Bradley*, 318 U.S. 50, and *Wade* v. *Hunter*, 336 U.S. 684, indicate the subtle technical controversies to which the provision of the Fifth Amendment against double jeopardy has given rise. Implications have been found in that provision very different from the mood of fair dealing and justice which the Fourteenth Amendment exacts from a State in the prosecution of offenders. . . ." *Brock* v. *North Carolina*, 344 U.S. 424, 428-429 (1953).

Thus there can be no Constitutional objection if a state, "either by her fundamental law or by an ordinary act of legislation," modifies the common law rule by providing that a new trial places the parties in the same position as if no trial had been had. *Kring* v. *Missouri*, 107 U.S. 221, 225 (1882). This change in the law, however, was recognized as a change in substance so that it could not be applied retroactively. This Court held that the State of Missouri could not prosecute a first-degree murder charge on retrial against one who had previously been convicted of second-degree murder where Missouri abolished the limited waiver doctrine after the commission of the crime. This Court said at 107 U.S. 234-235:

> "The case rests, then, upon the proposition that, having an erroneous sentence rendered against him on the plea accepted by the court, he could only take the steps which the law allowed him to reverse that sentence at the hazard of subjecting himself to the punishment of death for another and a different offence of which he stood acquitted by the judgment of that court.
>
> "That he prosecuted his legal right to a review of that sentence with a halter around his neck, when, if he succeeded in reversing it, the same court could

mizing their responsibility and misrepresenting that of the the appellate courts is not grossly prejudicial to the accused in a capital case.

Petitioner submits that the prosecutor's argument to the jury at the conclusion of his trial was so far removed from the minimum standards of "propriety and fairness" as to require a new trial. The District Attorney presented his appeal for a conviction in this way (R. 154):

> "Now if you should find this defendant guilty, the responsibility as to the consequences of your verdict falls to someone else. It is not you. You don't have to come down here at sometime later or even today or tomorrow, whenever you bring your verdict back, and say, well, now, you go to the electric chair. That is not your function. That is His Honor's function.
>
> "And it doesn't end there. There is the United States Court of Appeals.
>
> "They have a responsibility to *sift the facts* and *look them over* and *decide whether this man will go to the electric chair.* (Emphasis added.)
>
> "There is the Supreme Court of the United States. If they see fit, they can *look these facts over* and *decide if this man goes to the electric chair.* (Emphasis added.)
>
> "There is the President of the United States, who may look these facts over, and as you well know, often these sentences are commuted to something less than death in the electric chair.
>
> "There is the Attorney General of the United States, who may make recommendations to the President of the United States relative to this sentence.

tighten it to strangulation, and if he failed, it did him no good.

And this is precisely what has occurred. His reward for proving the sentence of the court of twenty-five years' imprisonment (not its judgment on his guilt) to be erroneous, is that he is now to be hanged instead of imprisoned in the penitentiary. No such result could follow a writ of error before, and as to this effect the new constitution is clearly *ex post facto.*"

Since the technical niceties of common law double jeopardy were imposed on the Federal courts by the Bill of Rights, *Brock* v. *North Carolina,* supra, at 428-429, and under that common law an acquittal was final,[7] it follows that the presumption of absolute waiver cannot be reconciled with the Fifth Amendment to the Constitution of the United States, which, unlike the Missouri constitution, has not been modified by subsequent amendment.

Although the *Trono* case arose in a legal system where an appellate court was free to substitute its judgment for the trial court's findings of fact, and although no more than four of the then justices of this Court felt able to join in the absolute waiver doctrine, six of the nine judges below felt obliged by it to decide adversely a Constitutional question which immediately involves the life or death of Petitioner

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[7] Holding that the doctrine of former jeopardy required that the United States have no right to appeal in a criminal case, the Supreme Court set out the following as the rationale:

"The common law maxim, and the Constitution are founded in the humanity of the law, and in a jealous watchfulness over the rights of the citizen, when brought in unequal contest with the State." *United States* v. *Sanges,* 144 U.S. 310, 315 (1892).

See also 2 Cooley's *Blackstone* 391 n. 3:

"An acquittal, even though against the weight of the evidence, is final. In the absence of statutory permission no new trial is granted the prosecution." Accord, Cooley, *Principles of Constitutional Law* 326 (3d ed. 1898).

and which substantially affects the right hereafter to appeal in the Federal courts of the United States.

If the opinion below is allowed to stand, not only will Petitioner be executed in consequence of having had the temerity to appeal an unsubstantiated conviction of an offense unrelated to that originally charged, but every accused hereafter convicted in the Federal courts of an offense differing from that for which he was indicted and tried, no matter how unjustly so convicted, will be required to make a choice between acquiescing in that unjust conviction or throwing aside the protection afforded him by the second jeopardy clause of the Constitution and incurring the hazards of a new trial without the benefit of his previous acquittal.

The decision below, which attaches conditions to the right of appeal which are both unwarranted by the Constitution and unfair, should be reversed by this Court.

I-B. An Unappealed Conviction of the Lesser Included Offense of Arson Bars Subsequent Prosecution for Killing Another While Perpetrating That Arson.

In addition to disregarding the actual acquittal at the defendant's first trial resulting from the failure of the jury to return a verdict of guilty on the first degree charge, the application by the court below of the *Trono* decision to the present case violated a second common law safeguard of the defendant's. This was the refusal of the court below to accept the implied acquittal resulting from the defendant's unappealed conviction of arson. In so doing the majority pronounced a rule which means that conviction of a lesser included offense can never bar a subsequent prosecution for the greater. R. 177-178.

When the indictment charges a killing in the perpetration of one of the felonies enumerated in D. C. Code, § 22-2401

> "Now I mention that, ladies and gentlemen, because I want to emphasize to you that it is the responsibility of those people, the Judge, the Court of Appeals, the Supreme Court, if they should decide to hear the case, the President of the United States, if it should come to his attention. It is the responsibility of those people to decide whether this man goes to the electric chair. It is not yours, ladies and gentlemen. I want to emphasize that because I consider it important that your function be defined by me to you."

These sentiments are again echoed by the District Attorney in the closing paragraphs of his remarks to the jury (R. 155):

> "The consequences or the result of your verdict is something that you are not concerned with or should be concerned with.
>
> "As I say, there is the Judge in this case, the Court of Appeals, the Supreme Court, the President, the Attorney General, and I am sure this man's rights will be protected all the way along the line. It is the responsibility of these other people to decide what to do with this man and not you, and I am sure his rights will be protected all along the line."

Patently, this dissertation upon the responsibility of the reviewing courts to look over the facts in this case and decide Petitioner's fate was not intended to benefit the accused. By attributing nonexistent powers and responsibilities to the appellate courts and by assuring the jury that his superior, the Attorney General, could recommend executive clemency, the District Attorney in effect suggested to the jury that "no ultimate harm could come to defendant if

"they should through error or intention relax somewhat in the application of those principles which ought to govern their deliberations in his favor. . . ." *People* v. *Esposito*, 224 N.Y. 370, 376, 121 N.E. 344, 346 (1918). See, *e.g.*, *People* v. *Friedt*, 280 App. Div. 836, 113 N.Y.S. 2d 889 (2d Dep't. 1952); *People* v. *Johnson*, 284 N.Y. 182, 187-188, 30 N.E.2d 465, 467 (1940). Indeed, by the time the court reporter had transcribed page 154 of the Record, the members of the jury must have wondered why they were there at all.

We recognize that the circumstances of the killing charged in this case would not be regarded as encouraging by an ambitious prosecuting attorney. Green was sixty-five years old. Allegedly, either in desperation or completely inadvertently, he caused the death of an elderly woman who had been his only friend and companion for years. A jury is naturally reluctant to return a verdict of guilty of first-degree murder where the accused has nursed the victim, celebrated her birthdays, and provided the last of his money for flowers for her funeral. R. 79-80. The circumstances of the case were such that the District Attorney felt compelled to ask the Court to instruct the jury that considerations of mercy and sympathy were immaterial. Tr. 642.

In New York, a 27-year-old widow was tried for drowning her two-year-old son. This was first-degree murder for which the penalty, as in the instant case, was death. Jobless, deceived by the man who had promised to marry her, and afterwards evicted from her rooming house, she decided that she could no longer care for the child and that "he would be better off dead." In closing argument, the jury was told that the Governor could commute the death sentence, should she be found guilty. The trial judge, in answer to a question of the foreman of the jury, said that the law permitted the jury to recommend mercy. The Court of Appeals of New York held that these remarks constituted

(1951), and there is no evidence of an act of killing independent of the felony, that felony is the only lesser included offense.

The defendant never sought review of his arson conviction at his first trial. R. 8, 187, n. 1, 2. The arson conviction was not set aside in his first appeal. R. 19, 178. He is advised by prison authorities that the full term expiration date of his sentence on the arson conviction is March 18, 1957.

In ignoring the bar raised by this conviction, the court below did violence to the normal test of what constitutes a lesser included offense, and in fact disowned the very reasoning it purported to respect.

The court below found that the test of what constituted a lesser-included offense was that set forth by the Supreme Judicial Court of Massachusetts in *Morey* v. *Commonwealth*, 108 Mass. 433 (1871). R. 177. As stated by that Court,

> "*if each statute* requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (Emphasis supplied).[8]

Ostensibly respecting this test, the court below upheld the later prosecution because "evidence sufficient for conviction under the first charge would not have convicted under the second indictment." R. 178. If this is held to be

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[8] The cases cited in support of this test are all examples of separate statutory offenses, each of which required proof of a separate act and a separate intent not required in the other—*Carter* v. *McClaughry*, 183 U.S. 365 (1902) (conspiracy to defraud & causing false and fraudulent claims to be made); *Gavieres* v. *United States*, 220 U.S. 338 (1911) (indecent behaviour in public & insulting and threatening a public official); *Morgan* v. *Devine*, 237 U.S. 632 (1915) (breaking and entering & larceny).

a correct statement of the law, no conviction of a lesser included offense will ever bar prosecution on the greater since, by definition, the lesser will always lack one element of proof required for conviction of the greater.

Under the *Morey* rule the defendant was clearly exempt from a second prosecution for killing another in the perpetration of an act of arson because every element of the arson had to be proved before he could be guilty of the killing while perpetrating arson. Here, rather than "each statute", only one required proof of an additional fact. That one defined the greater offense.

The proposition that an unappealed arson conviction would bar a subsequent prosecution for a killing arising out of that arson was accepted at common law. *State* v. *Cooper*, 1 Green 361, 25 Am. Dec. 490 (N.J. 1833); see *State* v. *Mowser*, 92 N.J.L. 474, 106 Atl. 416 (1919) (robbery conviction barred prosecution for felony murder). Cooper, convicted upon an indictment charging arson, successfully moved to dismiss a subsequent effort to prosecute him upon another indictment charging a consequent killing.[9] The rule in *State* v. *Cooper, supra*, which was indirectly relied on in the *Morey* case, has been cited with approval by this Court in several of the leading double jeopardy cases. See, *e.g.*, *Hans Nielson, Petitioner*, 131 U.S. 176, 190 (1889); *Ex Parte Lange*, 85 U.S. 163 (1873) at 170:

> "If in civil cases, says Drake, J., in *State* v. *Cooper*, the law abhors a multiplicity of suits, it is yet more watchful in criminal cases that the crown shall not oppress

[9] In *State* v. *Cooper, supra*, the charge of killing in perpetrating the arson was never submitted to the jury. Yet the conviction of arson barred further prosecution on the consequent killing. In the instant case the charge of killing while prepetrating arson was submitted to the first jury, and the jury, after deliberation, did not find the defendant guilty thereof but guilty of the lesser included offense of arson. The instant case is a stronger acquittal.

seriously prejudicial error. *People* v. *Sherwood*, 271 N.Y. 427, 435, 3 N.E.2d 581, 584 (1936):

> "Coming as it did, it amounted to nothing less than an invitation to possible doubting minds and uneasy consciences, to solve their doubts against the defendant, and to salve their consciences with the thought that, if they were wrong, executive grace might cure the error.
>
> * * * * *
>
> "Under the law of this state the penalty for murder in the first degree is death. No power or discretion is vested in any judge or court to vary it.
>
> * * * * *
>
> "The error almost certainly was prejudicial to the defendant."

In the instant case, the District Attorney's assurance that "the responsibility as to the consequences of your verdict falls to someone else" (R. 154), was no less prejudicial.

It is the duty of the trial court to interrupt the District Attorney on its own initiative when improper remarks are made to the jury. *Viereck* v. *United States*, 318 U.S. 236, 248 (1943); *Steele* v. *United States*, 222 F.2d 628, 631 (5th Cir. 1955); *State* v. *Hawley*, 229 N.C. 167, 48 S.E.2d 35 (1948); *see Ippolito* v. *United States*, 108 F.2d 668, 671 (6th Cir. 1940). If neither rebuke nor full instructions can remove the harmful effects of the remarks from the minds of the jury, see *State* v. *Hawley*, *supra*, the trial judge should discharge the jury and declare a mistrial. *Cf. Union Pacific R.R.* v. *Field*, 137 Fed. 14, 16 (8th Cir. 1905). "And where this duty has not been performed it is the plain duty

of the appellate court to set aside the judgment unless it is convinced that no possible harm has resulted." *See Fitter* v. *United States*, 258 Fed. 567, 572 (2d Cir. 1919).[11]

Conclusion

For the reasons stated above, the decision below should be reversed and the cause remanded to the court below with appropriate instructions.

Respectfully submitted,

GEORGE BLOW,
GEORGE RUBLEE, II,
CHARLES E. FORD,
Counsel for Petitioner by Appointment in the Courts Below.

MARCH, 1957.

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[11] "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). That life is at stake is an important factor in recognizing error where no objection is made. *See Williams* v. *Georgia*, 349 U.S. 375, 391 (1955). There is a presumption in law that prejudice results from error, *Ayer* v. *Territory of New Mexico*, 201 Fed. 497, 498 (8th Cir. 1912), and the possible persuasion of the appellate court of the guilt of the petitioner is not sufficient to rebut this presumption. *See Bollenbach* v. *United States*, 326 U.S. 607, 615 (1946); *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946).

> the subject, or the government the citizen, by unreasonable prosecutions."

The law is not so illogical as the opinion below would make it seem. Conviction of the lesser included offense has been held to bar later prosecution for the greater, and the courts so holding have relied on the *Morey* test. Unlike the court below, however, they have interpreted it properly. *See, e.g., Ekberg* v. *United States*, 167 F.2d 380, 386 (1st Cir. 1948); *Giles* v. *United States*, 157 F. 2d 588, 590 (9th Cir. 1946), *cert. denied*, 331 U.S. 813 (1947).

Normally, in order to prove murder, one need not prove arson. This was not true in the instant case where the indictment charged that the defendant, in perpetrating arson, caused the deceased to inhale certain gases, the inhalation of which resulted in her death, Unless the defendant were guilty of arson, he could not be guilty of the killing charged. The multiple nature of the prosecutions here is demonstrated by the fact that at the defendant's second trial it was necessary for the Government to show again that he was guilty of arson—the same offense of which he had been found guilty a year before and had not appealed—and that deceased died from inhaling gases produced by that same fire.

The decision in *State* v. *Cooper, supra*, which is directly in point, and which has been cited with approval by this Court, is completely consistent with the test adopted by the court below, and should be determinative of the question presented.

II. Statements Obtained From the Accused by Police and Fire Department Inspectors Over a Two and One-Half Day Period During Which the Accused Was Hospitalized Under Guard Should Be Excluded Where the Accused's Detention Had Not Been Sanctioned by a Committing Magistrate, Nor Had Accused Been Advised of His Constitutional Rights.

A Supreme Court rule intended to preclude the *opportunity* for police interrogation of a suspect before he has been brought before a committing magistrate and advised of his right to counsel and his right not to make statements which might later be used against him is substantially weakened by the opinion of the majority of the court below, which holds that assertions about the prearraignment questioning of the accused, heavily relied upon in the prosecution's presentation of the case, were admissible, *not in spite of, but because of* the fact that the accused required medical treatment. R. 181.

On May 26, 1953, at about 7:40 in the forenoon, Petitioner was discovered unconscious in the basement of a burning house. R. 21, 27. He was lying face down in two or three inches of water. R. 24. The front of his shirt was covered with blood (R. 24-25), and there was blood on his neck. R. 27. Firemen carried Green out to the lawn (R. 24, 27), where he was given oxygen and afterwards taken to Emergency Hospital. His interrogation began within an hour.

May 26, 1953

Between 8:30 and 9:00 A. M.

Sergeant Lionel Couture, Homicide Squad, Metropolitan Police Department, arrived at Emergency Hospital either between 8:30 and 8:45 A. M. (R. 83, 85), or between 8:45

APPENDIX A

AT COMMON LAW A SUCCESSFUL APPELLANT COULD BE RETRIED ONLY FOR THE OFFENSE EMBODIED IN THE CONVICTION APPEALED.

While the appeal in the present case was from a conviction of an offense lesser in degree but unrelated to the offense charged in the indictment and sought to be proved at the trial, and the common law cases discussed in this appendix deal with appeals from convictions of lesser offenses included in the greater charged in the indictment, nonetheless the common law doctrine, which limited refrial to the offense embodied in the conviction appealed, is relevant to the present situation.

The common law was reluctant initially to allow any waiver of jeopardy. *United States* v. *Gibert*, 25 Fed. Cas. 1287, No. 15,204 (1834). "In other words, the constitution guarantees to him the right of being hung to protect him from the danger of a second trial." *United States* v. *Keen*, 26 Fed. Cas. 686, 690, No. 15,510 (1839). The absurdity of refusing a new trial on constitutional grounds led to a grudging recognition that the defendant should be permitted to waive jeopardy with respect to the offense of which he had been convicted. Thus in *United States* v. *Keen*, *supra*, the court concluded at 689:

> "It surely does not follow that if the court may grant a new trial in a capital case, with the assent and on motion of the prisoner, on a verdict of guilty that they may do the same thing on a verdict of acquittal, and against the consent and remonstrance of the defendant."

The waiver was not extended beyond the prisoner's needs. Thus, when a conviction of a lesser included offense was appealed, the common law refused to extend the waiver of jeopardy to the greater offense on which the appellant had been tried and not convicted. This is substantiated by the common law rationale set out in *People* v. *Cignarale*, 110 N.Y. 23, 30-31, 17 N.E. 135, 142-143 (1888):

and 9:00 A. M. R. 108. He found Green lying on his back on an examining table. R. 90. Couture observed that he had two wounds on his neck and several marks on his chest. "They were bleeding a little, but they didn't seem to be too bad, I don't know." R. 87. It appears that the wounds had not been treated. R. 89-91, 117-118. Couture asked no one whether Green was in condition to be questioned. R. 118. While Couture did inform Green that he was from the Homicide Squad (R. 92-93), he did not then or at any time inform Green that any answers he gave might be used against him or that he had other rights. R. 94. At the conclusion of the interview, Couture telephoned the Third Precinct and requested them to send a policeman to the Hospital "to take charge of this gentleman until we return or until I return to the Hospital." R. 84, 107.

10:00 A. M.

Sergeant Couture, joined by Sergeant Alfred Clarke, returned to Emergency Hospital. Green had not been moved. R. 98, 103, 111. As to whether Green was in custody at that time, Sergeant Couture said, in response to a question by the court: "There were no officers there, no sir, just myself and Sergeant Clarke." R. 98. Although Couture could not recall whether any of Green's wounds had been treated by that time (R. 104, 119), Sergeant Clarke testified that there was a patch taped on his chest. R. 126, 138. It appears that Green was given neither water nor food while at Emergency Hospital. R. 59.

Questioning by Sergeants Couture and Clarke developed that Green had been to see a number of people in an effort to borrow several hundred dollars to forestall his eviction from the house. R. 127. Sergeant Clarke testified that Green first told him that he came down the front staircase of the house around 7:00 A. M. and that, on further ques-

"But in this state, and generally elsewhere, a party convicted is permitted, in some form, to have a review for the purpose of correcting any errors of fact or law which may have been committed on the trial; and it became a settled qualification of the doctrine that a party could not be twice tried for the same offense, that, by seeking and obtaining a new trial for error, he thereby waived the constitutional protection, and could be again tried for the offense of which he formerly was convicted. *U.S.* v. *Keen*, 1 *McLean*, 435; *People* v. *Dowling*, supra. *But this doctrine*, in turn, *was limited* so as *to protect a defendant who secured a reversal and new trial from being again put on trial* for a higher grade of the same offense, or *for another offense included in the same indictment*, of which higher grade, or of which other offense, the first conviction was by inference an acquittal. So it was held that a verdict of conviction of one of several offenses charged in an indictment, or of a lesser degree of a single offense, implied, although the verdict was silent on the subject, that the jury found the defendant not guilty of such other offenses, or of the higher degrees of the same offense. *It was on the theory that the verdict was separate and divisible, being both a verdict of acquittal and conviction*, and that there was no inconsistency between a claim that the defendant was not guilty even of that of which he was convicted, and the claim *that the verdict still stood as an acquittal of the other matters charged in the indictment*, that the defendant was permitted on a new trial to urge the former verdict as an acquittal of all the matters charged other than that on which the conviction was had." (Emphasis supplied.)[12]

That the common law thus limited the extent of the waiver of jeopardy attached to an appeal in a criminal case is evidenced by the decisions of the courts in twenty-three

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[12] Accord, *United States ex rel. Valenti* v. *Karmuth*, 1 F. Supp. 370, 375 (N.D.N.Y. 1932); *In re Bennett*, 84 Fed. 324, 325 (N.D. Calif. 1897); Clark, Criminal Procedure, 452 (2d ed. 1918).

tioning, "he changed his story and told me that he went down the back staircase. . . ." R. 127. Sergeant Couture testified that Green stated that he did not stop at the first floor on his way to the basement. R. 100, 110. This was an important point, since Green later testified that he stopped on the first floor to telephone a friend to disregard a suicide letter which he had written and mailed several hours before. R. 142. Couture further testified that he then asked Green whether or not he had written any letters that evening, and that Green denied having done so. R. 101, 112. The questioning, in general, shows that the two detectives from the Homicide Squad were convinced that Green was responsible for the fire. On their leaving the Hospital, the Third Precinct was again requested to place a guard on Green. R. 101.

2:10 P. M.

Green was admitted to the "strong room" of D. C. General (Gallinger) Hospital at 2:10 P. M. R. 63. He had been taken from Emergency Hospital on a stretcher in the custody of a policeman. R. 58, 143. The strong room is a locked ward with a policeman on guard. R. 68, 74, 121. There are bars around the room, which contains approximately a dozen beds. R. 68.

3:00 P. M.

Warren Kelly, a fire inspector assigned to the Fire Investigations Section of the Fire Marshal's Office, and Fire Marshal Roberts questioned Green for approximately one hour in the strong room at Gallinger. R. 37, 49, 68, 72. Kelly, like Couture, emphasized that Green said that he had not stopped on the first floor on his way to the basement. R. 69. When asked by the District Attorney whether or not Green admitted writing any letters, Kelly replied that he had asked the question and received a nega-

states. Of these thirteen have never departed from the limited waiver doctrine (see Table I), five have adhered to it despite legislation designed to extend an appellant's waiver to the greater offense of which he was not convicted (see Table II), and five followed it prior to the enactment of some such statute or constitutional amendment (see Table III).

The courts in seventeen states have not commented on what the common law rule was. Of these six have remained absolutely silent on the problem (see Table IV), and eleven never inquired beyond the legislative or constitutional provisions creating a presumption of absolute waiver (see Table V).

In only eight states are there decisions indicating that waiver of jeopardy was not limited at common law; in two of these, earlier cases recognizing the common law were overruled (see Table VI).

The minority opinion in *Trono* v. *United States*, 199 U.S. 521, 540 (1905), citing a number of states which followed the limited waiver doctrine, stated that this was "the general consensus of opinion of American textbooks on criminal law[13] and the overwhelming weight of American decided cases."

This is true today. The courts of Alabama, Arkansas, California, Florida, Georgia, Illinois, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Tennessee, Texas, Virginia, West Virginia and Wisconsin still hold in the absence of statute or constitutional amendment that a conviction of a lesser offense is an acquittal of the greater; that the accused, when he urges an appellate court to reverse his conviction of the lesser offense, thereby consents to be retried for that lesser offense, but that he does not waive the jeopardy he has been in on the greater. His application for a correction of the

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[13] Contemporary reaction to the majority decision was disapproving. A note in the Harvard Law Review for February 1906 stated the *Trono* case to be the first Supreme Court comment on the common law rule as to waiver of jeopardy and stated the decision was contrary to the weight of authority. 19 Harv. L. Rev. 300 (1906).

tive answer. R. 71-72. It is clear that Kelly suspected Green of arson. R. 148.

May 27, 1953

Green remained in custody in the strong room at Gallinger Hospital.

9:00 P. M.

A letter, evidently written by Green, was turned over to the police. R. 112. The text of the letter appears at R. 179-180. The letter notified a friend of Miss Brown's death and requested that flowers be purchased for her. It also included an ambiguous statement from which the prosecution sought to imply that there was a suicide pact (R. 136), but which the accused contended meant solely that Miss Brown, had she been alive, would have sympathized with his intent, subsequently changed (R. 142), to commit suicide. R. 140. The majority of the court below indicated that the questioning of the defendant prior to discovery of the letter was permissible, if for no other reason but that "the police could hardly be expected to make a murder charge on . . . suspicion alone." R. 181-182.

May 28, 1953

About 9:00 A. M.

Armed with this letter, Sergeants Couture and Clarke and Inspector Kelly questioned Green in the strong room at Gallinger. R. 78, 113. At 9:30 A. M., Sergeant Clarke noted that Green "made statement admitting writing letter." R. 130. At this interview, Green apparently told his questioners that he wrote the letter shortly after finding Miss Brown dead and mailed it at approximately 12:45 A. M. R. 129, 180. Nevertheless, Couture asserted that Green told them that he had written the letter "just prior

verdict, in other words, will not be considered as more extensive than his needs.

TABLE I

ALABAMA—*Thomas* v. *State*, 255 Ala. 632, 636, 53 So. 2d 340, 342 (1951); *Davis* v. *State*, 31 Ala. App. 508, 19 So. 2d 356 (1944).

FLORIDA—*Henderson* v. *State*, 55 So. 2d 110 (Fla. 1951); *McLeod* v. *State*, 128 Fla. 35, 174 So. 466 (1937); *State* v. *Lewis*, 118 Fla. 910, 160 So. 435 (1931); *Johnson* v. *State*, 27 Fla. 245, 271, 9 So. 208, 212 (1891).

ILLINOIS—*People* v. *Newman*, 360 Ill. 226, 195 N.E. 645 (1935); *People* v. *Carrico*, 310 Ill. 543, 545, 142 N.E. 164, 165 (1923).

MICHIGAN—*People* v. *Farrell*, 146 Mich. 264, 109 N.W. 440 (1906).

MINNESOTA—*State* v. *Lessing*, 16 Minn. 75, 80 (1870); *State* v. *Wiles*, 26 Minn. 381, 4 N.W. 615 (1880); See also Minn. Stat. Ann., § 611.10.

NEW JERSEY—*State* v. *Labato*, 7 N.J. 137, 80 A. 2d 617, 623 (1951); *State* v. *Cooper*, 13 N.J.L. 361, 25 Am. Dec. 490 (1833).

NEW MEXICO—*Ex parte Williams*, 58 N.M. 37, 43, 265 P. 2d 359, 363 (1954); *State* v. *Reed*, 39 N.M. 44, 39 P. 2d 1005 (1934); *State* v. *Welch*, 37 N.M. 549, 25 P. 2d 211 (1933); *State* v. *Pruett*, 27 N.M. 576, 203 Pac. 840 (1921).

OREGON—*State* v. *Wilson*, 172 Ore. 373, 382, 142 P. 2d 680, 683 (1943).

PENNSYLVANIA—*Commonwealth* v. *Flax*, 331 Pa. 145, 200 Atl. 632 (1938); *Commonwealth* v. *Alessio*, 313 Pa. 537, 547, 169 Atl. 764, 767 (1934).

TENNESSEE—*Reagan* v. *State*, 155 Tenn. 397, 293 S.W. 755 (1927); *State* v. *Norvell*, 2 Yerg. 24, 24 Am. Dec. 458 (Tenn. 1820).

to his detecting the odor of smoke. . . ." R. 113. Both Couture and Clarke testified that Green had said to them, in response to questioning, that "before he would let those people get the house, he would blow the so-and-so place up and then blow his brains out. . . ." R. 114, 130.

11:00 A. M.

Green was discharged from Gallinger Hospital at 11:00 A. M. R. 63. It appears that he was discharged at that particular time at the request of the police. R. 64. He was taken in police custody to the Coroner's Inquisition at the District of Columbia Morgue. R. 63; 1. The Coroner committed Green to the Washington Asylum and Jail to await Grand Jury action. R. 1.

To summarize, police interrogation of Petitioner commenced with his return to consciousness on an examining table in Emergency Hospital early on the morning of May 26, 1953, and continued there and in the strong room at the District of Columbia General Hospital for two and a half days until Petitioner was finally taken before the deputy coroner, who acted as committing magistrate. There is no evidence that at any time during this period Petitioner was advised of his rights or offered an opportunity to communicate with friends or counsel.

It appears from the majority opinion below that for the first 36 hours of this interrogation period, the police had no evidence to justify detaining the defendant on a murder charge. R. 181-182.

Assertions about the pre-arraignment questioning of the defendant during this detention were admitted in evidence against him. Some of the assertions, particularly as to the defendant's extravagant remark that he would have blown up the house and blown his own brains out before acquiescing in eviction, were offered as evidence of malice. Others

were offered to pursuade the jury that they could believe only the circumstantial evidence as to what occurred in the house before the arrival of the firemen. The prosecution, having tried this case before, was familiar with the defense, and these assertions were offered to discredit that defense before the defendant ever took the stand. They constituted an affirmative and vital part of the Government's effort to convict the defendant upon circumstantial evidence.[10]

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[10] Of the assertions made about the pre-arraignment questioning of the defendant, four may be singled out as highly prejudicial.

The first is that the defendant initially denied having written any letters. This assertion arises with respect to the interrogation of the defendant by Sergeants Couture and Clarke at 10:00 a.m. the morning of the fire. R. 101, 112, 127. It was offered by the prosecution to show that the defendant had a guilty mind. R. 151-152.

The second is that the defendant remarked he would blow up the house and blow his own brains out before acquiescing in eviction. This assertion arises with respect to the interrogation of the defendant on the third morning of his detention by Sergeants Couture and Clarke and Inspector Kelley. R. 114, 130. This assertion was offered by the prosecution to show that the defendant had a felonious intent.

The third, arising from that same interrogation, related to the time at which the defendant wrote the ambiguous letter. Two of the prosecution witnesses asserted that the defendant had told them he had written the letter just prior to smelling smoke, that is early on the morning of the fire. R. 72-73, 113. A third prosecution witness testified that the defendant had stated that he wrote the letter about midnight before the morning of the fire, that is shortly after he had discovered Miss Brown's death. R. 129. The conflict as to the time the letter was written was prejudicial to the explanation of the letter offered by the defendant, namely, that it did not express an intended suicide pact but rather his personal gloom upon discovering Miss Brown's death. R. 139-140.

The fourth arises with respect to what the defendant did not say during the pre-arrangement questioning. The prosecution's summation to the jury stressed the assertion that the defendant had never told any of his interrogators that Miss Brown had died prior to his writing the letter. R. 151-152. Actually, the defendant had told his interrogators this on the third morning (R. 129, 180), but the prosecutor chose to overlook that.

The majority below, in addition to the reasons discussed in the text above, expressed two further reasons for not excluding these assertions under the *McNabb* rule. The first such reason was that the assertions as to the interrogation of Petitioner at 10 a.m. the morning of the fire

state legislative or constitutional provisions requiring an appellant to waive the jeopardy he had been in on the greater offense when he appeals a conviction of a lesser included offense.

These decisions are no precedent for abrogating the common law rule in the Federal courts, for the restrictions *in favorem libertatis* imposed on the Federal courts by the Bill of Rights were not made wholly applicable to state governments. See, *e.g.*, *Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937); *Maxwell* v. *Dow*, 176 U.S. 581 (1900); *La. ex rel. Francis* v. *Resweber*, 329 U.S. 459, 462 (1947); *Brock* v. *North Carolina*, 344 U.S. 424, 428-429 (1953).

Thus, in *Kring* v. *Missouri*, 107 U.S. 221, 225 (1882), this Court held that a state might, "either by her fundamental law or by an ordinary act of legislation," abolish the limited waiver doctrine which obtained by court decision.

ARIZONA—Ariz. Code Ann. 1939, § 44-2008.
COLORADO—Colo. Const., Art. I, § 18.
IDAHO—Idaho Code, 1947, § 19-2405.
INDIANA—Burns' Ind. Ann. Stat., §§ 9-1901, 9-1902 (Burns' 1956 Replacement).
KANSAS—Kan. Rev. Gen. Stat., 1949, § 62-1602.
KENTUCKY—Russell's Ky. Codes 1953, Cr. Prac. § 270.
MONTANA—Mont. Rev. Codes 1947, § 94-7602.
OKLAHOMA—22 Okla. Stat. Ann., § 951.
SOUTH DAKOTA—S.D. Code 1939, § 34.4001.
UTAH—Utah Code Ann. 1953, 77-38-2.
WYOMING—Wyo. Const., Art. I, § 11 (1889).

TABLE VI

The courts of the eight states listed below represent the minority view that waiver of jeopardy was not limited at common law to the offense embodied in the conviction appealed. It should be noted that of these, Vermont and Washington at one time honored the majority common law rule.

CONNECTICUT—Conn. Gen. Stat. 1949, c. 433, § 8878.

NEBRASKA—*Macomber* v. *State*, 137 Neb. 882, 291 N.W. 674 (1940); *Bohanan* v. *State*, 18 Neb. 57, 24 N.W. 390

The case presents the question whether the rule formulated in *McNabb* v. *United States*, 318 U.S. 332 (1943), is to be suspended in situations where the physical condition of the one arrested precludes his being taken before a committing magistrate. The majority below stated (R. 181):

> "There was no unlawful detention due to failure promptly to carry him before a committing magistrate. He was arraigned just as soon as the hospital authorities released him. Delay in arraigning a suspect caused by his necessary hospitalization can hardly be called illegal detention."

The dissent below of Circuit Judge Bazelon and Chief Judge Edgerton confirms the nature of the majority holding (R. 183):

> "Because appellant's injuries required his confinement in a hospital during this period, the majority holds there was no 'illegal detention' within the meaning of Rule 5(a), F.R. Crim. P., and hence the *McNabb* rule does not bar the statements."

The consequent admission at the trial of testimony prejudicial to the defendant points up the unfairness that can

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were admissible because Petitioner then "not only was not being illegally detained but was not being detained at all." R. 180-181. With the dissenters below (R. 183), Petitioner submits that interrogation either in formal custody or while fairly constantly attended by policemen is interrogation subject to the *McNabb* rule. The custody that morning was all that was necessary to restrain Petitioner, who was in his sixties, was injured, and was lying on a hospital examination table.

The second reason advanced by the majority below was that the assertions were not made with respect to a confession but were made simply to shake Petitioner's credibility as a witness. R. 178, 181. These assertions did far more than merely shake the credibility of Petitioner. They were part of the prosecution's effort to show motive and to bolster a case which depended purely on circumstantial evidence. As the dissenters below point out (R. 183), after this Court's decision in *Opper* v. *United States*, 342 U.S. 84, 91 (1954), there should be no distinction between this sort of assertion and an asserted confession.

(1885), *motion to dismiss denied*, 118 U.S. 231 (1886), *cause set aside because of escape of prisoner*, 125 U.S. 692 (1887).

Nevada—Nev. Comp. Laws 1929, § 11030.

Ohio—General Code, § 13449-4.

North Carolina—*State* v. *Matthews*, 142 N.C. 621, 55 S.E. 342 (1906) (North Carolina has no constitutional provision on double jeopardy.)

South Carolina—*State* v. *Gilles*, 73 S.C. 318, 323, 53 S.E. 487, 489 (1906).

Vermont—*State* v. *Bradley*, 67 Vt. 465, 473 (1894). *Contra: State* v. *Kittle*, 2 Tyler (Vt.) 471 (1803), *overruled in State* v. *Pianfetti*, 79 Vt. 236, 247, 65 Atl. 84, 86 (1906) (Vermont has no constitutional provision on double jeopardy).

Washington—*State* v. *Ash*, 68 Wash. 194, 122 Pac. 995 (1912), *overruling State* v. *Murphy*, 13 Wash. 229, 43 Pac. 44 (1895) (partially relying on statute).

APPENDIX B

Cases Illustrating the Application of the Trono Doctrine

Examination of the cases citing *Trono* indicates that the absolute waiver doctrine promulgated by the four Justices with whose result Mr. Justice Holmes concurred has not been regarded as the law to be applied to a case arising in the Federal courts of the United States. This Court twice avoided such an extension by drawing highly technical distinctions. *Stroud* v. *United States* and *Burton* v. *United States, infra.* No Court of Appeals, prior to the Court of Appeals below in the instant case, was faced with the problem. (Both *Stroud* and *Burton* were direct appeals from the trial courts.) One District Court has extended the *Trono* doctrine to hold that an appellant from a conviction of second degree murder waived the jeopardy he had been in on first degree. *United States* v. *Gonzales, infra.*

result when a court's inquiry on the admissibility of pre-arraignment interrogation is limited solely to determining whether or not there has been "illegal detention" in violation of Rule 5(a).

While this Court was primarily concerned in *McNabb* with whether the police had violated the Congressional command in Rule 5(a), there is no reason to suppose that this Court intended to dispense with the exclusionary rule of evidence formulated in that case where the person arrested does not happen to be well enough to be brought before a committing magistrate. In phrasing what is now known as the *McNabb* rule, the Court expressed its concern with *any* conduct of federal law officers in plain disregard of the duties enjoined upon them by Congress. See *McNabb* v. *United States*, *supra*, at 341-345.

> "For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them.
>
> * * * * *
>
> "The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon Federal law officers.
>
> * * * * *
>
> "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law."

In restricting the application of the *McNabb* rule to the case where the delay is unreasonable under Rule 5(a), the

majority below ignored the fact that this Court was concerned with avoiding "all the evil implications of secret interrogation of persons accused of crime." *McNabb* v. *United States*, *supra*, at 343-344. It must be recognized that the purpose of Rule 5 is twofold: (1) the police are not to be the sole judges of the propriety of detaining arrested persons; (2) the police are not to have the opportunity to engage in prolonged interrogation of persons who have not been advised of their rights.

Otherwise expressed, the Congressional command was "designed to safeguard persons against compulsory questioning by law enforcement officers behind closed doors." Mr. Justice Black, concurring in *United States* v. *Mitker*, 350 U.S. 179, 191 (1956). This, of course, is precisely what happened here. There may have been reason for the two and one-half day delay in arraigning the defendant. But if the police were going to hold the defendant under lock and key and utilize the opportunity for interrogation in order to obtain evidence against him, a reasonable interpretation of Rule 5 would require that they first advise him of his right not to make a statement, that any statement made by him might be used against him, and that he had a right to counsel.

The anomalous result of excluding testimony concerning the statements made by a person under arrest during the period prior to his arraignment only if there has been a violation of Rule 5(a) is demonstrated by the fact that the majority of the court below approved the admission of testimony which should otherwise have been excluded under this Court's decision in *Upshaw* v. *United States*, 335 U.S. 410 (1948). For the majority below admits (R. 181-182):

> "It was not until Wednesday evening when they obtained the letter [some thirty-six hours after the de-

fendant's interrogation began] . . . that a murder charge was justified."

The majority below characterized Green's detention behind bars as "necessary hospitalization". R. 181. If so, there is serious doubt whether assertions as to statements made at this time should be permitted under any circumstances, for if the suspect is too ill to be brought before a committing magistrate, it would seem that he is too ill to make a considered statement concerning the crime. But, at any rate, it is only fair to insist that the police not proceed in "flagrant disregard of the procedure which Congress has commanded" in Rule 5(b). The significance of the warning advice prescribed by Rule 5(b) in federal criminal procedure is illustrated by *United States v. Carignan*, 342 U.S. 36 (1951), cited by the majority below at R. 182. In affirming Carignan's conviction, this Court emphasized the fact that the prisoner had been advised at his earlier arraignment of the right not to make a statement. 342 U.S. at 40.

This is a problem which has received serious consideration in England, where the courts have insisted that the police afford their prisoners cautionary advice before accepting statements made by them. See *McNabb v. United States*, *supra*, at 345 n. 9; 3 Wigmore, *Evidence* 294-298 (3d ed. 1940). As pointed out by the minority of the court below, the warning advice prescribed by Rule 5(b) is given every person under arrest by an agent of the Federal Bureau of Investigation. Hoover, *Civil Liberties and Law Enforcement*, 37 Iowa L.R. 175, 182 (1952); see *Pixley v. United States*, 220 F.2d 912, 913 (10th Cir. 1955), where the agent, unable to bring his prisoner before the Commissioner, advised him that he was not required to make a statement, that any statement he might make could be used against him and that he was entitled to an attorney.

Virginia—*Stuart* v. *Commonwealth*, 28 Grat. 950 (1877). The limited waiver rule was changed by Section 36 of Chapter 208 of Code of 1849 (Acts 1877-78, p. 279, c. 311) and afterwards reinstated by Section 4040 of Code of 1887 (now Va. Code Ann., § 19-222); see *Leigh* v. *Commonwealth*, 192 Va. 583, 591, 66 S.E. 2d 586, 591 (1951); *Taylor* v. *Commonwealth*, 186 Va. 587, 43 S.E. 2d 906 (1947).

West Virginia—*State* v. *McLane*, 126 W. Va. 219, 27 S.E. 2d 604 (1943), *reversed on jurisdictional grounds*, 38 S.E. 2d 343 (1946).

Wisconsin—*Radej* v. *State*, 152 Wisc. 503, 511, 140 N.W. 21, 23 (1913).

TABLE II

The courts in five states adhere to the limited waiver doctrine *even though* the state legislatures have provided by statute that the granting of a new trial places the parties in the same position as if no trial had been had:

Arkansas—*Hearn* v. *State*, 212 Ark. 360, 205 S.W. 2d 477 (1947); See Ark. Stat. 1947, 43-2205.

California—*In re Hess*, 45 Cal. 2d 171, 176, 288 P. 2d 5, 8 (1955); *People* v. *Krupa*, 64 Cal. App. 2d 592, 149 P. 2d 416 (1944); *People* v. *McDaniels*, 137 Cal. 192, 197, 69 Pac. 1006, 1008-1009 (1902); *compare* discussion of Cal. Pen. Code § 1180 in 36 Calif. L. Rev. 431, 435 n. 23 (1948) *with People* v. *McNeer*, 14 Cal. App. 2d 22, 30, 57 P. 2d 1018, 1021 (1936).

Iowa—*State* v. *Rhone*, 223 Iowa 1221, 275 N.W. 109 (1937); *State* v. *Coleman*, 226 Iowa 968, 976, 285 N.W. 269, 273 (1939); see Iowa Code 1931, § 13945, now Iowa Code 1946 § 787.4.

Louisiana—*State* v. *Harville*, 171 La. 256, 130 So. 348 (1930); 173 La. 660, 138 So. 435 (1931); 175 La. 458, 143 So. 373 (1932); see Dart's La. Crim. Code 1943, Arts. 515, 274.

Texas—*Tomlin* v. *State*, 155 Tex. Cr. 207, 233 S.W. 2d 303, 305 (1950); see Vernon's Code Crim. Prac. 1948, §§ 702, 759; see also *Parker* v. *State*, 22 Tex. App. 105, 108, 3 S.W. 100, 102 (1886).

TABLE III

The courts of the five states listed below recognized the limited waiver doctrine prior to the enactment of the state constitutional or legislative provisions abrogating the common law.

GEORGIA—Ga. Const., Art. I, § 2-102; see *Waller* v. *State*, 104 Ga. 505, 507 (1898).

MISSISSIPPI—Miss. Const., Art. III, § 22 (1890); see *Hurt* v. *State*, 25 Miss. 378, 59 Am. Dec. 225 (1853).

MISSOURI—Mo. Const., Art. II, § 23 (1875); see *Kring* v. *Missouri*, 107 U.S. 221 (1882); *State* v. *Ross*, 29 Mo. 32 (1859) (overruled by constitution).

NEW YORK—N.Y. Code Crim. Proc., §§ 464, 543-544; see *People* v. *Palmer*, 109 N.Y. 413, 17 N.E. 213 (1888); *People* v. *Cignarale*, 110 N.Y. 23, 30-31, 17 N.E. 135, 142-143 (1888).

NORTH DAKOTA—N.D. Rev. Code 1943, 29-2401; see result reached in *State* v. *Noel*, 66 N.D. 676, 268 N.W. 654 (1936).

TABLE IV

Examination of the reported decisions and statutes of the following six states has failed to disclose any position on the extent of the waiver of jeopardy attached to the appeal of a conviction of an offense lesser than or different from that charged in the indictment:

DELAWARE
MAINE
MARYLAND
MASSACHUSETTS
NEW HAMPSHIRE
RHODE ISLAND

TABLE V

The courts of the eleven states listed below have not examined the extent of waiver that obtained at common law but have based their decisions simply on their respective

The remainder of this appendix describes all the cases which Shephard's Citations lists as citing *Trono*.

Trono In The Supreme Court

Thirteen Supreme Court decisions cite *Trono*. Of these, four concern cases arising in the Federal courts, three deal with cases from the state courts, and six deal with cases coming from the Philippine courts.

As outlined in the text, the prohibition against double jeopardy contained in the Fifth Amendment is not equally applicable to the federal, state and insular governments. The cases arising from state and insular courts should not, therefore, be considered a precedent for cases arising in Federal courts.

A. Cases from Federal Courts

The four cases coming up from lower Federal courts do not imply any abolition of the common law rule, under which appellant, by appealing, waived jeopardy only with respect to the degree of offense of which he had been convicted. In none of these cases was there a prior acquittal.

The two most recent decisions indicate that defendant's intent is the determining factor in weighing the propriety of a new trial after a conviction in chief has been reversed. *Sapir* v. *United States*, 348 U.S. 373 (1955); *Bryan* v. *United States*, 338 U.S. 552 (1950). If defendant's intent is to be the primary consideration, it would seem that the common law rule would most closely give force to that intent since, under that rule of limited waiver, a defendant is presumed to waive jeopardy only with respect to the offense of which he was convicted and which he appealed.

In 1919 the Court avoided extending the *Trono* decision to an analogous case arising in the Federal courts. *Stroud* v. *United States*, 251 U.S. 15, 18 (1919). The Court there upheld the propriety of a new trial for first degree murder being awarded an appellant erroneously convicted of first degree murder, even though the previous jury had recommended a sentence "without capital punishment."

The Court distinguished the case from the situation

where there had been a conviction of an offense lesser than that on which he was tried.

> "The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." 251 U.S. at p. 18.

One year after the *Trono* decision the Supreme Court again refrained from extending the *Trono* decision by distinguishing another closely analogous situation. *Burton v. United States*, 202 U.S. 344 (1906). Defendant there, a United States Senator, was indicted upon three counts—two charging he had unlawfully received money from a corporation, the third charging that he had unlawfully received money from a named individual described as an officer of the corporation. Defendant was convicted on the first two counts and acquitted as to the third. On his appeal the Supreme Court reversed and ordered a new trial. At the new trial the indictment was identical as to the first two counts but the third count was changed to allege that defendant had received money from the corporation rather than from the named individual.

When considering the propriety of this new trial on the third count the Supreme Court held that the indictments were different so that the defense of prior acquittal would not apply.

The Court said:

> "Whether that reversal, upon defendant's own writ of error, had the effect, within the principle of *Trono v. United States*, 199 U.S. 521, to take from him the benefit of his acquittal on the third count in the former case, we need not decide. It may be assumed, for the purposes of this discussion, that it did not." 202 U.S. at p. 378.

To summarize, the Court, in the thirteen years following the *Trono* decision, resorted to highly technical distinctions rather than relying on the *Trono* decision when deciding cases arising in the Federal courts. The Court has not up

to now been faced with a situation in which the common law rule as to waiver had to be decided. It has, however, taken a position that would be consistent with the common law rule.

B. Cases from State Courts

The three cases arising from state courts indicate not only that the strict common law restrictions imposed upon the Federal Government by the Bill of Rights are not made applicable to the States via the Fourteenth Amendment, but also that this Court has not been entirely satisfied with the rightness of the *Trono* decision:

> "Right-minded men, as we learn from those opinions [*Kepner* and *Trono*], could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case." *Palko v. Connecticut*, 302 U.S. 319, 323 (1937).

> "The judicial history of the Fifth Amendment in prohibiting any person from being 'subject for the same offence to be twice put in jeopardy of life or limb' serves as a good pragmatic confirmation of the compelling reasons why the original Bill of Rights was found to limit the actions of the Federal Government and not those of the States. The conflicting views expressed in *Ex parte Lange*, 18 Wall. 163; *Kepner v. United States*, 195 U.S. 100; *Trono v. United States*, 199 U.S. 521; *In re Bradley*, 318 U.S. 50, and *Wade v. Hunter*, 336 U.S. 684, indicate the subtle technical controversies to which the provision of the Fifth Amendment against double jeopardy has given rise. Implications have been found in that provision very different from the mood of fair dealing and justice which the Fourteenth Amendment exacts from a State in the prosecution of offenders. . . ." *Brock v. North Carolina*, 344 U.S. 424, 428-429 (1953).

The third state case was a *per curiam* denial of certiorari to a state court for want of a substantial federal question. *Jones v. Mississippi*, 273 U.S. 639 (1926).

C. Cases from Insular Possessions

The cases arising from the Philippines cite the *Trono* decision only as authority for Philippine procedure.

> "Section 5 of the act of Congress contains no specific requirement of a presentment or indictment by grand jury, such as is contained in the Fifth Amendment of the Constitution of the United States. And in this respect the Constitution does not, of its own force, apply to the Islands." *Ocampo* v. *United States*, 234 U.S. 91, 98 (1914).

> "*Trono* v. *United States* needs very little comment. It declares the relation of the courts and the scheme of procedure existing in the Philippine Islands and brings the case at bar to the simple proposition, when stripped of ingenious suggestions, that an error which was made (if error was made, of which we express no opinion) at the trial in the court of first instance, and which was not repeated in the Supreme Court, is not a ground of legal complaint.' *Pendleton* v. *United States*, 216 U.S. 305, 311 (1910).

Two other opinions also note the differences between federal and Philippine procedure. *Diaz* v. *United States*, 223 U.S. 442, 445-446 (1912); *Flemister* v. *United States*, 207 U.S. 372, 374 (1907).

The other two citations of the *Trono* decision are *per curiam* opinions dismissing appeals from the Supreme Court of the Philippines for want of jurisdiction. *Beecham* v. *United States*, 223 U.S. 708 and 709 (1911).

Trono In The Courts of Appeals

Shephard's citations reveal eight cases decided by the Federal Courts of Appeals in which the *Trono* decision is cited.

Four of these cite *Trono* for the proposition that one who appeals his conviction of the principal offense charged in the indictment waives the plea of former jeopardy thereto in a new trial. *Bryan* v. *United States*, 175 F.2d 223, 229

(5th Cir. 1949); *Barkman* v. *Sanford*, 162 F.2d 592, 593 (5th Cir. 1947); *Bayless* v. *United States*, 147 F.2d 169, 170 (8th Cir. 1945); *Salta* v. *United States*, 44 F.2d 752, 753 (1st Cir. 1930).

One cites *Trono* for the proposition that one who moves for a new trial may not object to it when granted by reason of former jeopardy. *Miller* v. *United States*, 224 F.2d 561, 562 (5th Cir. 1955).

Two others cite *Trono* as an analogous authority where a court corrects an inadvertently erroneous sentence prior to the commencement of service of that sentence. *United States* v. *Bozza*, 155 F.2d 592, 595 (3d Cir. 1946); *Rowley* v. *Welch*, 72 U.S. App. D.C. 354, 356, 114 F.2d 499 (1940).

The eighth case came up from Puerto Rico. The first circuit followed the *Trono* decision in holding that an acquittal of murder in an insular court arising from a conviction of manslaughter following an indictment for murder could not be used by the successful appellant to bar a new trial on that indictment for murder. *Carbonell* v. *People of Porto Rico*, 27 F.2d 253 (1st Cir. 1928).[14] The Congressional Code for Puerto Rico specifically abolished the common law rule of limited waiver of jeopardy. As pointed out above, this case does not stand as authority for the treatment of persons by the Federal courts in the United States.

Trono In The District Courts

Shephard reveals two district court opinions citing *Trono*. In one of these *Trono* is cited simply for the proposition that double jeopardy may be waived. *United States* v. *Gill*, 55 F.2d 399, 400 (D. N.M. 1931). The other case is the sole

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[14] Where territorial courts have been primarily concerned with persons brought up in the common law heritage, the Constitution has followed the flag. *United States* v. *Owens*, 2 Alaska 480 (3d Div. 1905). Editorial comment on this case stated: "In connection with this decision it should be noted that it was by the territorial court, and consequently must be considered as, in effect, overruled by the decision in *Trono* v. *United States*, *supra*." 22 L.R.A. (N.S.) 959, 961 (1909). Where the prior system of law had not contained the procedural safeguards of the Anglo-Saxon system, there is no question of the applicability of *Trono*.

example of a Federal court extending the application of the *Trono* decision to a case arising in the United States federal system. *United States* v. *Gonzales*, 206 Fed. 239 (W.D. Wash. 1913).

(4301-8)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 46

EVERETT D. GREEN,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER.

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Preliminary Statement

Two decisions of this Court, published after argument was held last term in the present case, raised points of law worthy of consideration in connection with the rehearing of the present case.

The first point of law, raised by *Carroll* v. *United States*, 354 U.S. 394 (1957), is that Congress in conferring appellate jurisdiction over criminal cases in the federal courts did not grant federal appellate courts the power, in derogation of the prevailing state court rule, to require a successful appellant to stand retrial upon an offense greater in degree than that of which he had been convicted. The common law rule prevailing in the states at the time this

jurisdiction was conferred on the federal courts was that a successful appellant, convicted of an offense lesser in degree than that charged in his indictment, could not be retried on that greater offense. Congress has not in subsequent jurisdictional statutes changed the scope of authority originally granted federal appellate courts with respect to ordering new trials. In fact in enacting the Uniform Code of Military Justice Congress reaffirmed its approval of the common law limitations on the scope of a second trial in a criminal case.

Accordingly it would appear that the United States Court of Appeals for the District of Columbia Circuit lacked jurisdictional power to remand Petitioner's case, after his successful appeal from a conviction of second-degree murder, for retrial on the greater offense of first-degree murder. This lack of jurisdiction suggests a basis for reversal independent of the constitutional objection to the second trial on the ground it placed Petitioner twice in jeopardy on the charge of first-degree murder.

The second point of law, raised by *Yates* v. *United States*, 354 U.S. 298 (1957), indicates that the doctrine of collateral estoppel, suitably modified, may be carried over into criminal proceedings to prevent relitigation of an issue of critical fact previously determined in defendant's favor. Thus the verdict of the first jury in the present case which necessarily included a finding that Petitioner had not killed while perpetrating a felony should have precluded consideration of that issue of fact by the second jury, and, since that issue was crucial to the verdict of guilty of murder in the first degree, the trial before the second jury should have been barred.

I.

Congress Has Never Conferred Jurisdiction on a Federal Appellate Court to Require a Successful Appellant To Be Retried for an Offense Greater Than That Embodied in His Conviction.

While Petitioner's prior brief took the position that the principles of *autrefois convict* and *autrefois acquit*, as embedded in the Fifth Amendment, raised a constitutional bar to his second trial on the higher offense on which he had previously been tried but not convicted, this Court's recent decision in *Carroll* v. *United States*, 354 U.S. 394 (1957), suggests that it may be unnecessary to reach the constitutional question in deciding the present case.

Mr. Chief Justice Warren's opinion for a unanimous Court in *Carroll* indicates that the intent of Congress at the time of conferring appellate jurisdiction over criminal cases in the federal courts may well be determinative of the present question. That intent would be disclosed by the state of the law when jurisdiction was conferred.

> "It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. And since the jurisdictional statutes prevailing at any given time are so much a product of the whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act, 1 Stat. 73, they have always been interpreted in the light of that history and of the axiom that clear statutory mandate must exist to found jurisdiction." 354 U.S. at 399.

The Act of February 6, 1889, 25 Stat. 656, which created appellate jurisdiction in federal criminal cases contained

no explicit statement as to the power of an appellate court to direct a new trial when the appeal had been from conviction of an offense lesser in degree than that charged in the original indictment.

> "That hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be reexamined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe.
>
> * * * * * *
>
> "When any such judgment shall be either reversed or affirmed the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution."

The general grant of power to a federal appellate court to remand for proceedings consistent with its decision should not be interpreted as Congressional disapproval of the majority state court rule then prevailing which limited retrial to that degree of offense of which appellant had been convicted. See cases cited in Appendix A to Petitioner's prior brief.

In *United States* v. *More*, 7 U.S. 159, 172 (1805) it was held that Congressional grants of jurisdiction would be most narrowly interpreted. The Act there construed, 2 Stat. 106, conferred appellate jurisdiction over "any final judgment, order or decree in" the District of Columbia Circuit Court where the matter in dispute exceeded $100. Rejecting

argument that criminal cases could thus be reviewed, Mr. Chief Justice Marshall said:

> "But as the jurisdiction of the [this] court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation; under the constitution, prohibiting the exercise of other powers than those described."

[5] This same caution about expanding its appellate jurisdiction led this Court to distinguish the questions it might review under writ of habeas corpus from questions that were reviewable traditionally by writ of error and hence unreviewable by this Court prior to 1889. *Ex Parte Yarborough*, 110 U.S. 651, 653 (1884). It also led to this Court's refusal to review criminal cases from the lower federal courts by way of certiorari. *Ex Parte Gordon*, 66 U.S. 503, 504-5 (1861).

The Act of March 3, 1891 establishing Circuit Courts of Appeals did not expand the powers of a federal reviewing court but instead conferred jurisdiction to review final lower federal court decisions not reviewable directly by this Court. 26 Stat. 828.

The Act of January 20, 1897 merely amended the Act of March 3, 1891, so as to withdraw review of non-capital cases from this Court and place it in the Circuit Courts of Appeals. 29 Stat. 492. This delegation of appellate power in federal criminal cases to the Circuit Courts of Appeals did not in any way purport to change the scope of power in connection with remands.

Not until the Act of March 3, 1911 was power conferred on this Court to correct lower federal court error in criminal cases by writ of certiorari. Congress in authorizing review and determination by writ of certiorari conferred

on this Court only "the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." 36 Stat. 1157. This Act did not enlarge the powers of the Courts of Appeals on remand. 36 Stat. 1133.

From this point on in time the changes in appellate jurisdiction are described in the historical note to 28 U.S.C.A. Sec. 1291. None appear germane to the present question until the advent of the Federal Rules of Criminal Procedure, on March 21, 1946.

Petitioner's position is that the Federal Rules of Criminal Procedure did not expand the powers of an appellate court with respect to the scope of a new trial in a criminal proceeding. Two opinions of this Court, in addition to *Carroll* v. *United States, supra,* are relevant, *Bryan* v. *United States,* 338 U.S. 552 (1950), and *Sapir* v. *United States,* 348 U.S. 373 (1955).

In *Bryan* it is stated that under the Act of March 3, 1891 the Circuit Courts of Appeals were authorized to direct a new trial after reversing a conviction for insufficiency of the evidence to sustain a verdict. 338 U.S. at 555. While this sounds as though Congress in 1891 had authorized a power on remand inconsistent with the common law prohibition against retrial on the greater charge of which appellant had not been convicted, such is not the case. This practice of awarding a new trial where a conviction had been obtained upon insufficient evidence, though but rough justice, nonetheless had strong roots in the common law when the erroneous conviction was for the greatest degree of crime charged. It prevailed in England under the common law prior to 1789. 13 East 416; 4 Blackstone *361. The early common law practice, more appropriate to the present type of situation, would have stopped further proceedings and allowed defendant to seek pardon from

the King. East, *supra*. Another practice that would have been applicable would have been to attaint the jurors and restore defendant to liberty. 3 Blackstone *401-4; 4 Blackstone *361.

The *Bryan* case and the precedents cited therein, however, do not deal with the more subtle and developed rules of common law that applied when the conviction was for a lesser degree of offense than that charged in the indictment. This case indicates that the Congressional grant of power did not change the common law rule.* The *Sapir* case, furthermore, interprets the Federal Rules of Criminal Procedure to grant powers on remand that vary with the intent of the appellant. The rule limiting the scope of a new trial, expressed by the common law courts and advocated in Petitioner's prior brief, rested primarily upon considerations of appellant's intent. The *Sapir* case reaffirms that rule. The common law rule is stated in *Trono* v. *United States*, 199 U.S. 521, 531 (1905): "His application for a correction of the verdict is not to be taken as more extensive than his needs."

One final problem requires disposition. If Petitioner's position on the narrow scope of federal appellate review is correct, a question arises as to the authority of this Court to sustain the conviction in the *Trono* case. That conviction, it will be remembered, was imposed by the Philippine Supreme Court which substituted its judgment for the lesser conviction obtained in the trial court under reviews. The answer to this question is to be found in the

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* It was but five months after the *Bryan* case that Congress specifically reaffirmed the common law rule by enacting the Uniform Code of Military Justice which provided that upon rehearing by court-martial "the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed . . .". Act of May 5, 1950, Art. 63(b), 64 Stat. 127-8.

special grant of jurisdiction in Section 10 of the Act of July 1, 1902 providing for civil government in the Philippine Islands, 32 Stat. 695. As was urged in Petitioner's prior brief very different constitutional considerations are involved by a trial in a federal court within the United States and by a trial in the semi-foreign court in an insular possession. It is not surprising, therefore, that Congress conferred different grants of review power with respect to these very different courts.

It is submitted that, without touching upon the constitutional questions of former jeopardy, the action of the United States Court of Appeals for the District of Columbia in directing and approving the retrial of Petitioner here on an offense for which he had previously been tried and not convicted was beyond the scope of the jurisdiction conferred upon that court by Congress. The conviction obtained at this unauthorized trial should therefore be set aside and further proceedings against Petitioner upon this indictment quashed.

II.

Collateral Estoppel Should Have Barred Relitigating the Issue of Whether Petitioner Had Killed Another While Perpetrating a Felony.

In *Yates* v. *United States*, 354 U.S. 298, 336 (1957) Mr. Justice Harlan for the majority held that a finding in a denaturalization proceeding that petitioner had not advocated violent Communist action prior to 1927 did not collaterally estop a finding in a subsequent Smith Act prosecution of such advocacy after 1927. The majority opinion and also the separate opinions of Justices Black and Douglas indicate, however, that had there been in the earlier proceeding "determinations of fact, and mixed fact and law, that were essential to the decision" showing a lack

of proof of an element of the offense subsequently prosecuted, then collateral estoppel and considerations of former jeopardy would have barred the subsequent prosecution.

Petitioner here was found by the verdict of the first jury guilty of second degree rather than first degree murder. That verdict required as a determination of "mixed fact and law . . . essential to the decision" the finding that Petitioner had not caused death through his perpetration of arson. A contrary finding would have required a verdict of first degree murder. Such a contrary finding was essential to the verdict of the prosecution that Petitioner was guilty of first degree murder. The second jury, however, should have been collaterally estopped from obtaining that determination by the contrary determination essential to the first verdict.

Now two objections may appear to this reasoning. Both of them to be sustained, require violent disregard of the basic fairness that should govern a criminal prosecution.

The first objection requires substituting speculation about the minds of the first jurors for a proper construction of their verdict. It would argue that since the trial judge instructed the jurors that a second degree verdict could be returned if they found Petitioner to have caused death without premeditation, the jurors ignored the trial court's proper instruction on first degree. The first degree instruction told them that they must return a verdict of first degree murder if they found Petitioner had caused death while perpetrating arson.

The argument would proceed, still speculatively, that the basis of the jurors' second-degree verdict was a misinterpretation of the trial court's charge. Presumably that misinterpretation would be that a verdict of second degree was permissible, despite a finding that Petitioner caused death while perpetrating arson, if Petitioner's act was

unpremeditated. This speculation may or may not seem plausible. Nonetheless, it is improper and should not be preferred to a reading of the verdict in the light of a proper interpretation of the judge's instructions.

If an assumption must be made about the minds of jurors, one would have to assume that they correctly rather than incorrectly interpreted the law expounded to them. A correct interpretation of that law would be that the jurors could return a second degree verdict if they found Petitioner had, without premeditation, caused death independently of the commission of arson. In other words, for second degree to be returned, the jurors had to find that Petitioner had not caused death in perpetrating arson.

This distinction was drawn in *Kitchen* v. *United States*, 92 U.S. App. D.C. 382, 205 F.2d 720 (1953), where there was doubt as to whether defendant had, without premeditation, killed and then decided to rob (second degree) or had decided to rob and, without premeditation but during the act of robbing, killed (first degree).

In deciding now what determinations of fact were essential to the verdict of second degree made by the first jury in the present case, it would be presumptuously unfair for an appellate court to assume, solely on the basis of speculation, that those jurors were misinterpreting the instructions of law made to them. In fact, any judicial inquiry as to why those jurors returned that verdict would violate the sanctity of the jury room. The verdict must be given its reasonable and proper interpretation. That necessarily includes a finding that Petitioner did not cause death while perpetrating arson.

Mr. Justice Holmes, delivering the opinion of a unanimous Court in *United States* v. *Oppenheimer*, 242 U.S. 85 (1916), held that such an issue, once determined in the defendant's favor, could not be readjudicated without doing

violence to the fundamental principle of *res judicata*. Mr. Justice Holmes said at page 88:

> ". . . We may adopt in its application to this case the statement of a judge of great experience in the criminal law: 'Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings.' Hawkins, J., in *The Queen* v. *Miles*, 24 Q.B.D. 423, 431. The finality of a previous adjudication as to the matters determined by it, is the ground of decision in *Commonwealth* v. *Evans*, 101 Massachusetts, 25, the criminal and the civil law agreeing, as Mr. Justice Hawkins says. *Commonwealth* v. *Ellis*, 160 Massachusetts, 165. *Brittain* v. *Kinnaird*, 1 Brod. & B. 432. Seemingly the same view was taken in *Frank* v. *Mangum*, 237 U.S. 309, 334, as it was also in *Coffey* v. *United States*, 116 U.S. 436, 445.
>
> "The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter* v. *Hewitt*, 22 How. 352, 364), in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time."

The second objection to collateral estoppel being asserted here would argue that the first verdict was in the same proceeding as the second verdict rather than being in another litigation. It would ignore the facts that the two

verdicts were returned at separate trials held over a year apart and that during the second prosecution Petitioner stood convicted of arson. More fundamentally it ignores the basic purpose of the prohibition against double jeopardy—to prevent multiple prosecutions. Failure to interpose a bar would approve relitigation in a criminal proceeding of an issue of fact previously determined in defendant's favor.

CONCLUSION

For the reasons stated above—namely, that requiring Petitioner to stand a second trial upon an offense for which he had previously been tried and not convicted is beyond the power of a federal appellate court, and that relitigating in that second trial a crucial issue of fact previously found in favor of Petitioner violates principles of collateral estoppel—the judgment of the court below should be set aside and the case remanded for dismissal of further proceedings. This same conclusion would apply should this Court direct a reversal on the constitutional grounds set forth in Section I of Petitioner's prior brief.

In the event that this Court should direct a reversal for the reasons expressed in Sections II or III of Petitioner's prior brief the case should be remanded with appropriate instructions.

Respectfully submitted,

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George Rublee, II,
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Counsel for Petitioner by Appointment in the Courts Below.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

EVERETT D. GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals reversing the conviction of second degree murder (R. 7–13) is reported at 218 F. 2d 856. Its opinion, on rehearing *en banc* after retrial (R. 172–188), is reported at 236 F. 2d 708.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1956 (R. 189). The petition for a writ of certiorari was filed on July 27, 1956, and was granted on November 19, 1956 (R. 190). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, who had been tried for first degree murder and convicted of second degree murder, could be retried on the original charge of first degree murder after the conviction of second degree murder was reversed on petitioner's appeal.

2. Whether petitioner's unappealed conviction of arson bars, on the principle of *autrefois convict*, his conviction of first degree murder on the second trial.

3. Whether a delay of two and one-half days between the time of petitioner's arrest and the time he was taken before a committing magistrate, occasioned by the hospitalization of petitioner for the treatment of his stab wounds, precluded the use, to impeach his credibility, of statements he had made on the first day of his hospitalization.

4. Whether remarks of the government attorney in rebuttal to defense counsel's final summation to the jury were improper and prejudicial to substantial rights of the petitioner.

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

The Fifth Amendment provides, in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *

District of Columbia Code (1951), § 22–401 provides:

> Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat,

> vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meetinghouse, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than one year nor more than ten years.

District of Columbia Code (1951), § 22–2401 provides:

> Whoever, being of sound memory and discretion, kills another personally, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22–401 or 22–402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

District of Columbia Code (1951), § 22–2403 provides:

> Whoever with malice aforethought, except as provided in section 22–2401, 22–2402, kills another, is guilty of murder in the second degree.

Rule 5 (a), Federal Rules of Criminal Procedure, provides:

> (a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making

> an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

Rule 31 (c), Federal Rules of Criminal Procedure, provides:

> The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

STATEMENT

1. Petitioner was charged in a two-count indictment returned on July 6, 1953, in the District Court for the District of Columbia with arson and first degree murder in violation of District of Columbia Code (1951), sections 22–401 and 22–2401 (R. 2–3). After trial, he was found "guilty of arson on Count 1" and "guilty of second degree murder on the second count" (R. 3–4). On March 19, 1954, he was sentenced to imprisonment of from one to three years on Count One, and to serve a concurrent term of imprisonment of five to twenty years on Count Two (R. 4–5).

Petitioner appealed from the conviction of murder in the second degree, but did not appeal from the conviction of arson (R. 6). The Court of Appeals, noting that "all the testimony as to what occurred in

the burning house pointed to murder in the first degree and nothing else" (R. 12), reversed the conviction. In concluding its opinion, the court stated (R. 12):

> Here, had the erroneous instruction under which he was convicted not been given, Green might have been found not guilty under the second count. In seeking a new trial at which—if the evidence is substantially as before—the jury will have no choice except to find him guilty of first degree murder or to acquit him, Green is manifestly taking a desperate chance. * * * At oral argument we inquired of his counsel whether Green clearly understood the possible consequence of success on this appeal, and were told the appellant, who is 64 years of age, says he prefers death to spending the rest of his life in prison. He is entitled to a new trial.

After remand of the case by the Court of Appeals, when it appeared that petitioner would be retried on the second count, he moved to dismiss the indictment on the ground that he had once been in jeopardy for the offense charged (R. 15–16). The court denied the motion (R. 17) and the second trial began on May 16, 1955 (R. 17). The motion was renewed before the jury was impanelled (R. 18), at the close of the government's case (R. 138), and again at the conclusion of the defense testimony (R. 150), and was denied each time. The jury returned a verdict of guilty (R. 157–158). Motions for a judgment of acquittal or, in the alternative, for a new trial, were denied by the trial court (R. 17–19, 158, 159, 160). On June 17, 1955, the court sentenced petitioner to

death by electrocution, the mandatory sentence for first degree murder (R. 160–161).

2. On the second trial, the evidence established that fire-fighting apparatus responded to a fire at 1115 Massachusetts Avenue, N. W., Washington, D. C., at approximately 7:40 a. m., Tuesday, May 26, 1953 (R. 20–38). Firemen, on breaking into the smokefilled house, discovered the lifeless body of Betty Brown (R. 124–125), a woman 83 years of age (R. 28), and found petitioner lying face down in a bathtub in the basement in about 2 or 3 inches of water, apparently unconscious and bleeding from several flesh wounds on the upper part of his body (R. 21–27). It was ascertained that Betty Brown died from pulmonary edema caused by the inhalation of hot irritating gases produced by the fires in the burning house (R. 27–37).

Challenged evidence resulting from the subsequent questioning of petitioner by fire and police officers was developed through the government witnesses Kelly and Couture. The testimony was first heard outside of the presence of the jury (R. 43–56; 83–108) at which time petitioner was given full opportunity to testify (R. 57–62). After objections to the admission of this testimony were overruled, the government witnesses were allowed to give their testimony to the jury (R. 68–80; 108–124). Their testimony may be summarized as follows:

After petitioner was removed from the house, he was taken to Emergency Hospital by the rescue squad (R. 24, 55). Police Sergeant Couture of the Homicide Squad, who had arrived on the scene of the fire shortly

after 8:00 a. m. and knew none of the facts, interviewed petitioner about 8:45 a. m. to find out what had happened (R. 83, 94, 108, 125). He found petitioner on an examining table at the hospital (R. 83). Petitioner was suffering from shallow, superficial flesh wounds about the lower part of his chest, one small superficial wound on either side of the neck, and smoke inhalation (R. 63–64). He was clear and coherent (R. 85). Petitioner was not under arrest nor in custody of the police (R. 85).

Sergeant Cotture introduced himself to petitioner as a member of the Homicide Squad (R. 93) and questioned him for about fifteen minutes as doctors and nurses were coming in and out in connection with their duties (R. 86–88). Petitioner said that when he woke up at 7:00 a. m. he smelled smoke and went to the basement to investigate. There, he said, he was attacked by a big colored man who stabbed him several times with a long shining dagger, which was left embedded in his chest up to the hilt (R. 86, 110).

In the meantime, Inspector Kelly of the District of Columbia Fire Department had inspected the burned house and had found evidence that five independent fires had been set, apparently with the use of turpentine (R. 38–39, 41, 128); and that a plug had been removed, apparently with a wrench found on the scene, from a pipe leading into the gas meter, allowing gas to escape (R. 22, 125, 132). He also found a blood covered icepick (R. 125, 131–132), and on a table in the kitchen, a pencil, stationery, and a pair of reading glasses (R. 39, 125, 127).

After his initial fifteen minute conversation with petitioner at Emergency Hospital, Sergeant Couture returned to the scene of the fire. About 10:00 a. m. or a little later the same morning, he returned to the hospital with Sergeant Clarke, also of the Homicide Squad (R. 98, 111, 126). At this time petitioner was still on a table in an examining room and not in police custody (R. 109, 111): His chest wounds had been bandaged (R. 126). The officers asked petitioner how he explained the five fires and the removal of the plug from the gas meter. Petitioner said the colored man must have done it (R. 98, 100–101, 127). When asked by the officers, who had found the glasses and writing materials on the kitchen table, whether he had been writing letters, petitioner said he had not (R. 101). Petitioner could not identify either the wrench or the icepick, although he said he owned several of each (R. 127).

Later the same day, petitioner was taken by ambulance from Emergency Hospital to the District of Columbia General Hospital (Gallinger) (R. 58). He was placed in a large locked ward with about a dozen other patients, a policeman standing guard outside the door (R. 43, 49–50, 68–69). About 3:00 p. m. that afternoon, Fire Inspector Kelly accompanied by Fire Marshal Roberts came to the hospital to talk with petitioner (R. 42–43, 45). Inspector Kelly had previously been told by Police Sergeant Couture at the scene of the fire that it had not been ascertained who had caused the fires. He went to the hospital because petitioner was the only one known to have direct knowledge of the fires (R. 47, 73).

Prior to questioning petitioner, Inspector Kelly asked permission of a policeman to do so. The policeman asked petitioner, who said that was "okay" (R. 43, 45, 47–48). The inspector also asked the nurse if petitioner was in condition to talk and was told it would be all right (R. 48). The fire inspector, accompanied by Fire Chief Roberts, was then admitted to the ward by a nurse (R. 49–50, 74–75). Inspector Kelly shook hands with petitioner as he sat up in bed and questioned him about his injuries (R. 51). During the subsequent questioning, petitioner answered questions freely and voluntarily. No threats or promises were made, and no duress was used (R. 43–44). During the questioning petitioner sat on the side of the bed at times and stood up at other times (R. 53).

Petitioner told Inspector Kelly substantially the same facts about smelling smoke when he had awakened at 7:00 a. m., going to the basement, and being attacked by a colored man who stabbed him with a "long, shiny dagger [that he had] in his hand" (R. 53–54). He said he then crawled to the basement bathroom, ran water in the bathtub, and put his nose close to the water to avoid suffocation (R. 54–55). He stated also that he thought the "colored fellow" who attacked him had set the fires, that after smelling the smoke he had not tried to arouse Betty Brown, and that he had not been writing letters the night before (R. 55).

Inspector Kelly testified that on this visit he talked with petitioner approximately an hour (R. 72). Petitioner, on the other hand, testified that (R. 62) "he wasn't in there three minutes".

At no time during May 27, 1953, the day following the fire, did any fire or police officer talk with petitioner about the fire.

On May 28, 1953, between 9:00 and 9:30 a. m. Sergeants Couture and Clarke and Inspector Kelly again talked with petitioner in the ward at D. C. General Hospital (R. 72).[1] His version of the incident was substantially the same as before (R. 72). When shown the icepick, however, he stated that he then remembered being stabbed with it instead of a dagger, and he also remembered that he had had a hard time pulling it out of his skin (R. 72). Petitioner was shown a letter which the officials had obtained from a Mrs. Anthony after the interview with petitioner on May 26 (R. 179), which he identified and admitted having written (R. 72–73, 79, 113, 129, 134–137). The letter stated (R. 179–180; Gov. Ex. 4–a):

> Tuesday A. M. Please notify W. T. Thompson, Fredericksburg, Virginia, of Miss Betty Brown's death. A fine and good lady, a true friend to me. We both want it this way. Good-bye, my friend.
>
> /s/ EVERETT
>
> Please have my ashes thrown on the Chesapeake Bay (okay) The inclosed is for flowers for her.

It was postmarked Washington, D. C., May 26—12:30 p. m.—1953 (R. 179). Petitioner explained

[1] Defense counsel Ford stated to the court (R. 129), "We are making no objections to this conversation, Your Honor, on the 28th". Previously he had limited his objection to Couture's testimony only in respect to the first interview Couture had with petitioner at "8:30 on the 26th [the day of the fire] at Emergency Hospital" (R. 81). See p. 55 *infra*.

that he had written this letter sometime after midnight before the fire (R. 79, 129).* He then identified the box of stationery taken from the house (which was admitted in evidence without objection (R. 130)).

At 11:00 a. m. the same day (May 28), shortly after the interview with the police sergeants and the fire inspector, petitioner was discharged by the hospital as well enough to leave (R. 63–64). He was taken by the police to the coroner who held him to await the action of the grand jury (R. 62, 180).

3. On appeal, the Court of Appeals affirmed the conviction. On rehearing before the court *en banc*, the majority reaffirmed the conviction, that "We conclude that the *Trono* case [*Trono* v. *United States*, 199 U. S. 521] is authoritative and requires us to hold that Green was not subjected to double jeopardy when, upon remand, he was tried for murder in the first degree" (R. 176) and noting that no true *McNabb* rule problem was present in the case (R. 178). Two dissenting opinions were filed, one rejecting the application of the *Trono* decision to this case (R. 187–188), and the other finding an illegal detention of petitioner (R. 182–187).

---

* At the trial petitioner testified that he had gone to bed at midnight before the fire, but had got up sometime thereafter and found Mrs. Brown dead (R. 139). He then got his stationery, wrote the letter admitted in evidence, and mailed it at 25 minutes to 1:00 (R. 140). He explained that when he wrote it (R. 140) "I intended to bump myself off at the time." He testified that he then went back to bed, awoke at 7:00 a. m., and made an unsuccessful attempt to call Mrs. Anthony to whom the letter was addressed to tell her not to pay any attention to it (R. 141–142).

SUMMARY OF ARGUMENT

I

Under an indictment charging, in two counts, arson and first degree murder in the course of committing a felony, the jury at petitioner's first trial returned a verdict of guilty as to the arson and of guilty of second degree murder, which the judge had instructed was a permissible verdict. On appeal from the murder conviction alone, petitioner contended, and the Court of Appeals agreed, that it was error to submit the issue of second degree murder to the jury—that on the facts the only possible verdicts on the first degree murder charge were guilty as charged or acquittal.

A. On these particular facts, there is no basis for petitioner's contention that his appeal from the second degree murder conviction waived jeopardy only to the extent that he was then in jeopardy, *i. e.*, to the extent of second degree murder. The very basis on which petitioner had the second degree verdict set aside precluded his retrial for second degree murder. Petitioner's appeal cannot therefore be said to have sought correction of errors limited to second degree murder.

The jury at the first trial did not intend to acquit petitioner of murder. It is impossible to tell what it would have done had it been properly instructed that it must find first degree murder or acquit. The fact is that both the government and the defendant were prejudiced by the erroneous instruction—the defendant because he might have been acquitted and the government because he might have been found guilty

of first degree murder (as at the second trial). There is thus no foundation for the argument that the jury at the first trial, by its verdict of second degree murder, impliedly acquitted petitioner of murder in the first degree.

Petitioner's argument comes down to the contention that an appeal from his conviction is not a waiver of jeopardy since under his theory he could not be retried at all. The federal rule, however, is well established that a new trial, granted on the application of the defendant, puts him in the position he occupied before trial under the original charge, and makes him vulnerable to the same liabilities as if the case were being tried for the first time. See *Bryan* v. *United States*, 338 U. S. 552, 560.

B. Even in the situation where a defendant is convicted of a lesser included offense which could be established under the same evidence at a retrial, and on his appeal the conviction is reversed, he can, under the rule established in *Trono* v. *United States*, 199 U. S. 521, be retried for the higher degree of crime charged in the indictment. The *Trono* decision specifically held that where a defendant is charged with murder, convicted of a lesser included offense, and takes an appeal to correct the errors of the first trial, he may be proceeded against as though no trial had previously taken place, since the reversal of the judgment of conviction opens up the whole controversy. The Court also specifically rejected the contention, now urged by petitioner, that the defendant may limit his waiver and consent to

retrial only in the degree of the crime of which he was previously convicted.

Petitioner's attempt to distinguish *Trono* by virtue of the fact that it arose from the Philippines is met by the decision itself which was prefaced with the observation that (199 U. S. at p. 530) "[w]e may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country *. * *". His further attempt to diminish its impact by relying on the division of opinion and the fact that Mr. Justice Holmes concurred only in the result is equally without force since Mr. Justice Holmes indicated his *a fortiori* agreement with the relevant principles set forth in the *Trono* ruling, in other opinions both before and after *Trono*.

While the state decisions are divided on the issue, roughly half of the jurisdictions adhere to the *Trono* view. The American Law Institute has recommended against the "limited waiver" theory, especially where the accused contends that his conduct, though constituting the greater offense, does not constitute the lesser offense.

The application of the "limited waiver" theory as a rule of federal law would make serious inroads on the independence of the jury at the second trial. The assumption that a jury tacitly acquits the accused of the greater degree of crime by its verdict in a lesser degree is not a self-evident proposition in view of the role that sympathy and compromise may often play. And where the first verdict was reached after erroneous instructions which prejudiced the government as well as the defendant it would be impossible to calcu-

late the effect such error may have had on the verdict. The "limited waiver" rule proceeds, fallaciously, on the theory that the verdict was tainted only insofar as it found the defendant guilty of the crime charged but was valid insofar as it determined the degree of the crime which was committed. And it forces the second jury to accept the inarticulated conclusions of the first jury, even though the evidence on the second trial may differ.

II

Petitioner's contention that his unappealed conviction of arson under the first count bars, on the principle of *autrefois convict,* his second trial for first degree murder assumes that a person may not be put twice in jeopardy for one transaction. That a single act or transaction may, on the contrary, violate more than one criminal statute, so long as each requires proof of a fact not essential to the other, has been well established as a rule of federal law. *Pereira* v. *United States,* 347 U. S. 1, 9.

A. Arson is not a lesser included offense of first degree felony murder. The gravamen of the crime of felony murder is the homicide. Proof of the felony is the means by which premeditation, necessary to first degree murder, is established. The malice necessary to first degree murder is, both at common law and under the statute, established, either by the showing of actual premeditation, or, in appropriate cases, by the presumption of malice that arises from the commission of a felony. In fact, one of the conditions of proof of felony murder is that the felony relied on must be independent of and not a lesser included

offense of the murder charged. The arson is thus not an integral element of the murder, but is merely evidence relating to the element of felonious intent.

B. The elements of the offense, and not the facts of a particular trial, are determinative on issues of double jeopardy. Since arson is a wholly separate offense from felony murder, the unappealed conviction for arson does not bar retrial for murder.

III

Petitioner challenges the testimony of two government witnesses, that of a police and a fire officer, as to exculpatory statements that he made to them at the Emergency and D. C. General Hospital on the first day of a 2½-day period of hospitalization and before it was possible to take him before the coroner. He argues that such evidence was obtained in violation of the rule of *McNabb* v. *United States*, 318 U. S. 332, a rule excluding confessions obtained from an accused after a period of prolonged illegal police detention. Since petitioner concedes that no coercive tactics were employed, and does not deny that he was unavailable for arraignment during the time he was questioned, his position really comes down to a claim that it was improper, within the rationale of the *McNabb* rule, to question him at all during this period—an extension of that rule which this Court has consistently rejected. *United States* v. *Carignan*, 342 U. S. 36, 44–45.

1. Shortly after the fire, petitioner was removed to Emergency Hospital (a private hospital) and there, while under no police restraint, was questioned

for fifteen minutes by a police officer who had as yet no information identifying petitioner as a suspect, and during routine questioning he gave an exculpatory statement, the substance of which he recounted on the trial. Although he was suffering from superficial stab wounds, the police officer testified he was under no apparent incapacity during this conversation.

2. About two hours later, after it had been determined that the fire might have been caused by arson, petitioner was again questioned by the police officer. Still under no police restraint, he gave substantially the same version of what had happened, and was able to recount at the trial the substance of what he had said.

3. The main thrust of petitioner's *McNabb* argument relates to a conversation petitioner had with Fire Inspector Kelly that afternoon at D. C. General Hospital after petitioner had been put in a bed in a locked ward with about a dozen other patients. Kelly, accompanied by a fire marshal, first obtained petitioner's permission and that of a policeman and the ward nurse to question him. Petitioner was questioned as the only person known to have direct knowledge of the fire, and on this occasion he gave generally the same exculpatory account of what happened as he had previously related. During this questioning he was in the presence of other patients, he sat or stood while being questioned, and no coercive tactics of any kind were used. He testified the fire officers were not in the room as long as three minutes although Kelly testified it was an hour.

Under these circumstances, where there was no illegal or unreasonable detention, no coercion or other improper tactics were employed, and only exculpatory statements were given which were used on the trial for impeachment purposes alone, no mechanical rule should be invoked to exclude such statements solely on the basis of the time when they were given. (*United States* v. *Carignan*, 342 U. S. 36, 44–45). The holding to this effect by the trial judge who considered all the surrounding circumstances in special proceedings outside of the presence of the jury before the evidence was introduced, and that of the Court of Appeals, is amply justified.

IV

Finally, petitioner contends that remarks of the government counsel to the jury were improper in that they attempted to assure the jury that it did not have the final responsibility in capital cases. In the context of the record, however, it is clear that government counsel was merely seeking to correct the misleading impression made by defense counsel that the jury had the final responsibility of imposing the death penalty, and that their findings both as to the fact of the crime and the sentence of death by electrocution was final in the sense of being beyond further review of any other authority. Defense counsel, though given the opportunity, interposed no objection to the summation, nor did he seek correction in the court's charge to the jury.

ARGUMENT

Petitioner contends that his conviction at the first trial of second degree murder was in effect an acquittal of first degree murder, so that, even though the conviction was at his instance set aside, he could not be retried for murder in the first degree. He also argues that his conviction for arson, which was not appealed, bars a retrial for murder in the course of committing arson. Thus he claims double jeopardy both on the grounds of *autr fois acquit* and of *autrefois convict*.

We discuss, in Point I, the defense of *autrefois acquit, i. e.*, the situation presented by the appeal from the second degree murder conviction, without regard to the effect of the arson conviction. In Point II, we treat the problem presented by the appeal from the murder conviction in the face of the unappealed conviction for arson. The remaining two points relating to the trial errors claimed by petitioner are discussed in Points III and IV.

I

PETITIONER WAS NOT PUT TWICE IN JEOPARDY BY THE RETRIAL OBTAINED BY HIM UNDER THE ORIGINAL INDICTMENT CHARGING HIM WITH THE CRIME OF MURDER IN PERPETRATING THE FELONY OF ARSON

The discussion in this point relates to the effect of the conviction for second degree murder at the first trial and petitioner's appeal therefrom, without regard to the unappealed conviction for arson. It is petitioner's argument that the conviction of second

degree murder, although erroneous, nevertheless amounted to an acquittal of first degree murder, with the result that he could not be retried for the higher degree of murder even though he had obtained the new trial on the theory that it was error to submit the issue of second degree murder to the jury. The essence of petitioner's argument is that his appeal waived double jeopardy only to the extent that he was then in jeopardy, *i. e.*, second degree murder, and that it did not waive jeopardy as to first degree murder.

We show first that, whatever validity this argument may have generally in other situations, it cannot apply to the particular factual situation here presented where petitioner's appeal was predicated upon the contention, which the Court of Appeals accepted, that if petitioner was not guilty of first degree murder he had to be acquitted. And then we consider generally the rule that a reversal opens up the whole case so that there may be a retrial for the greater degree of the offense.

A. UNDER THE PARTICULAR FACTS OF THIS CASE, PETITIONER'S APPEAL FROM THE SECOND DEGREE MURDER CONVICTION NECESSARILY IMPORTED A WAIVER AS TO RETRIAL FOR FIRST DEGREE MURDER CHARGED IN THE INDICTMENT

The murder count (the second count) in this case charged murder in the perpetration of the felony of arson. It was not necessary for the government to prove that petitioner intended to kill the victim, but only that in perpetrating the crime of arson he caused her death. *Goodall* v. *United States*, 180 F. 2d 397, 400 (C. A. D. C.). Nevertheless, at the first trial, in submitting the case to the jury under the second count,

the trial judge instructed the jury not only as to the law relating to felony murder, but also as to the law of second degree murder which requires proof of killing with malice aforethought. 22 D. C. Code 2403, *supra*, p. 3. On his appeal after conviction, petitioner contended that since there was no evidence in the record to sustain a conviction of murder in the second degree (*i. e.*, no evidence of intent to kill with malice aforethought) the trial court erred in submitting the question of second degree murder to the jury. The Court of Appeals sustained petitioner's contention, holding (218 F. 2d at p. 857) that "when the evidence at a trial tends to show the defendant committed arson, and that the fire was the sole cause of the victim's death, the defendant is either guilty of murder in the first degree or he is not guilty". The Court of Appeals also pointed out that (*ibid.* p. 859) "in seeking a new trial at which—if the evidence is substantially as before—the jury will have no choice except to find him guilty of first degree murder or to acquit him", Green had been warned of the desperate chance he was taking, but that he had elected to take that chance nevertheless (see the Statement, *supra*, p. 5).

This case is therefore distinguishable from those where a defendant is charged with premeditated murder, is found guilty only of second degree murder, and procures by his appeal a new trial because of a trial error. While even in that situation, as we shall demonstrate (*infra*, pp. 25–47), the entire record is opened up again for whatever disposition a new jury may make, there, unlike here, it would

at least be possible for a new jury to try the defendant for second degree murder. In this case, petitioner asserted, and the Court of Appeals held, that the evidence adduced on the first trial could support only the theory of felony murder, and that the theory of second degree murder was wholly extraneous to the case. Therefore, on a new trial, second degree murder would not be provable under the charge of felony murder.[3]

In these circumstances, it cannot be said that the jury at the first trial, by its verdict of second degree murder, impliedly acquitted petitioner of murder in the first degree. Certainly, it is indisputable that the jury at the first trial did not intend to acquit

[3] In its first opinion in this case (218 F. 2d, 856, 857) and in prior opinions cited therein in footnotes (*Ibid.* p. 857, fn. 3; p. 859, fn. 5), the Court of Appeals refers to second degree murder as a crime "necessarily" included in the crime of felony murder, but then goes on to state that it is includable only if supported by the evidence in a particular case. While this appears to be an inconsistency, what the court apparently means is that in any case where a defendant is charged with felony murder he may nevertheless be found guilty of second degree murder as a lesser included offense if the evidence is sufficient to prove an intent to kill with malice aforethought.

Since felony murder, unlike premeditated murder, does not require proof of intent to kill, under the laws of the District of Columbia (*Goodall* v. *United States*, *supra*, 180 F. 2d at p. 409), it would appear necessary, in order to convict a defendant of the lesser crime of murder with malice aforethought, to include in the charge an additional averment of intent to kill since that additional element of proof would be essential to conviction for second degree murder. See *Evans* v. *United States*, 153 U. S. 584, 594. The second count of the instant indictment did not include such an averment (R. 3).

petitioner entirely of the offense of murder.[4] The instruction given prejudiced both the government and the defendant. It is impossible to tell what the jury would have done had it been properly instructed that it must find first degree murder or acquit. When, therefore, petitioner by his appeal argued that the jury was improperly allowed to consider second degree murder, he cannot be said to have sought correction of errors limited to second degree murder or of errors which were prejudicial only to him.

What he may have hoped for was a dismissal of the indictment. But it is clear that he knew that, if retried, he would be retried for first degree, and not for second degree murder. Therefore, the rationale

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[4] In finding that the defendant committed arson (*i. e.*, was guilty on Count I) and that the death resulted from the fire (a prerequisite, under the evidence in this case, to the finding of second degree murder on Count II), the jury found all the essential ingredients of first degree murder under 22 D. C. Code 401. The verdict of guilty of second degree murder is therefore analogous to the recommendation of "no capital punishment" in *Stroud* v. *United States*, 251 U. S. 15, 18, held not to preclude imposition of capital punishment on retrial. Since the negative implications of the first verdict cannot fairly be read as an acquittal of first degree murder, the basic premise of the plea of *autrefois acquit* fails. See p. 15, fn. 18, *infra*.

In his brief in the Court of Appeals urging reversal of the first conviction, the only relief explicitly sought by petitioner was that the "judgment appealed from should be reversed". Brief for Appellants, p. 26. Petitioner nowhere in that brief suggested that the indictment should be dismissed or that the consequence of reversal would not be a new trial. And see p. 5 *supra*.

Nor does it appear that, at the oral argument, petitioner's counsel told the Court of Appeals that, if dismissal of the indictment or a judgment of acquittal were not to be ordered

that, if he waived double jeopardy, he did so only as to second degree murder cannot fit this particular situation. If petitioner waived the plea of double jeopardy, he necessarily in this case waived it as to the murder which the indictment charged—first degree murder—and which he was urging was the only offense for which he could be tried.

To sustain petitioner's position on the facts of this case would really require a holding that his appeal from the conviction was not at all a waiver of jeopardy—if the conviction were affirmed, he would be in the same position as in the trial court and if there were a reversal he would go free on this charge. The contrary is too well established to require elaboration. A new trial, when granted as the result of action by the defendant, sets aside the original verdict, puts him in a position as though he had never been tried under the original charge, and makes him vulnerable to such fresh disposition of his case as may be just, including a possible increase in his sentence if he is again found guilty. See *Bryan* v. *United States*, 338 U. S. 552, 560; *Stroud* v. *United States*, 251 U. S. 15, 18; *Murphy* v. *Massachusetts*, 177

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by that court, petitioner desired that the conviction for second degree murder should stand—*i. e.*, that petitioner did not desire the Court of Appeals to order a new trial. Petitioner's counsel states that he did inform the Court of Appeals that "any effort to retry petitioner upon the same indictment would raise a problem of double jeopardy" (Pet. Br. 17, fn. 4) but counsel does not say that he informed the Court of Appeals that petitioner would reject an order of remand for new trial (if that should be the judgment of the appellate court), and would prefer to accept the second degree conviction.

U. S. 155, 158; *United States* v. *Ball*, 163 U. S. 662, 672.

B. GENERALLY, REVERSAL ON APPEAL FROM A CONVICTION OPENS UP THE WHOLE CHARGE FOR RETRIAL

Even in the situation where a defendant is convicted of a lesser included offense *which could be established under the same evidence*, and on his appeal the conviction is reversed and remanded for a new trial, he can, under established precedents of this Court, be retried for the higher degree of crime charged in the indictment.

1. The leading case is *Trono* v. *United States*, 199 U. S. 521, where in a Philippine court the defendants, who had been charged with first degree murder, were convicted in the court of first instance of the lesser included offense of assault. The Supreme Court of the Philippine Islands reversed the judgment of the court of first instance and convicted the accused of the crime of homicide (in substance, murder in the second degree), which is included in and is a lower degree of the crime charged in the complaint, but is a higher degree of crime than that of which the accused were convicted in the court below. The defendants argued in this Court that, when they were acquitted by the court of first instance on the charge of homicide, their jeopardy was ended, that they therefore could not again be tried for that offense without being put twice in jeopardy, and that by appeal from the conviction of assault the accused did not waive their immunity from second jeopardy on the charge of homicide.

The main opinion in this Court affirming the judg-

ment below prefaced its discussion of the legal issue involved with the following statement (199 U. S. at p. 530):

> We may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country, where, upon an indictment for a greater offense, the jury had found the accused not guilty of that offense, but guilty of a lower one which was included in it, and upon an appeal from that judgment by the accused a new trial had been granted by the appellate court, and the question was whether, upon the new trial accorded, the accused could be again tried for the greater offense set forth in the indictment, or must the trial be confined to that offense of which the accused had previously been convicted, and which conviction had, upon his own motion, been set aside and reversed by the higher court.

The opinion then specifically rejected the theory advanced in the case of *People* v. *Dowling*, 84 N. Y. 478, 483,* that a defendant may limit his future jeopardy

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*The opinion quoted (199 U. S. at pp. 530–531) the following language of Chief Judge Folger's opinion in the *Dowling* case as stating the opposite viewpoint (84 N. Y. at p. 483):

"The matter at the bottom is the constitutional provision that 'No person shall be subject to be twice put in jeopardy for the same offense (Const. of N. Y. Art. 1, par. 6), and yet new trials are granted in criminal cases on the motion of the accused, and if he gets a new trial he is thus subject to be twice put in jeopardy. This is done on the ground, that by asking for a correction of errors made on the first trial, he does waive his constitutional protection, and does himself ask for a new trial, though it brings him twice in jeopardy. But that waiver, unless it be expressly of the benefit of the verdict of acquittal, goes no further than the accused himself extends it. His application for a correction of

to so much of the judgment as convicted him of guilt, and settled the rule for federal courts as follows (199 U. S. at pp. 531–532, 533, 534):

> And generally, it may be said that the cases holding that a new trial is not limited in the manner spoken of proceed upon the ground that in appealing from the judgment the accused necessarily appeals from the whole thereof, as well that which acquits as that which condemns; that the judgment is one entire thing, and that as he brings up the whole record for review he thereby waives the benefit of the provision in question, for the purpose of attempting to gain what he thinks is a greater benefit, viz., a review and reversal by the higher court of the judgment of conviction. Although the accused was, as is said, placed in jeopardy upon the first trial, in regard not only to the offense of which he was accused, but also in regard to the lesser grades of that offense, yet by his own act and consent, by appealing to the higher court to obtain a reversal of the judgment, he has thereby procured it to be set

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the verdict is not to be taken as more extensive than his needs. He asks a correction of so much of the judgment as convicted him of guilt. He is not to be supposed to ask correction or reversal of so much of it as acquitted him of offense. He, therefore, waives his privilege as to one, and keeps it as to the other. It is upon this principle, that where, by verdict of guilty on one count or for one offense, and an acquittal on or for another, there has been a partial conviction on an indictment, and on writ of error there has been a reversal of the conviction, the acquittal still stands good, and is, as to that count or offense, a bar. As to that, the plea of *autrefois acquit* can be upheld, though the plea of *autrefois convict* cannot be upheld as to the offense of which the verdict was guilty. The waiver is construed to extend only to the precise thing concerning which the relief is sought."

aside, and when so set aside and reversed the judgment is held as though it had never been. This was in substance decided in *United States* v. *Harding, et al.*, tried in the United States Circuit Court in 1846, 26 Fed. Cas. 131, before Mr. Justice Grier, then a member of this court, and this is the ground substantially upon which the decisions of the other courts are placed.

* * * * *

In our opinion the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judg-

ment which he has himself procured to be reversed.

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* * * As there is, therefore, a waiver in any event, and the question is as to its extent (that is, how far the accused by his own action may be deemed to have waived his right), it seems much more rational and in better accord with the proper administration of the criminal law to hold that, by appealing, the accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part of it which acquitted him of the higher while convicting him of the lower offense. When at his own request he has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case. It does not appear to us to be a practice founded on solid reason to permit such a limited waiver by an accused party, while himself asking for a reversal of the judgment.

Petitioner attempts to diminish the impact of the *Trono* decision in two ways. First, he stresses the fact that it arose in the Philippines and did not directly involve a question arising under the Fifth Amendment. This objection however is met by the fact that the Court regarded the question presented as though it had arisen in the federal courts in this country, as the above-quoted excerpt from the main opinion (*supra,* p. 26) demonstrates.[7]

[7] Since a provision of the Civil Government Act forbade double jeopardy in the Philippine Islands, this Court found it unnecessary in *Kepner* v. *United States*, 195 U. S. 100, 124, to

Petitioner also relies on the division of the court in *Trono*. After noting that only Justices Brewer, Brown and Day concurred in the opinion of Mr. Justice Peckham, and pointing out that an equal number of Justices dissented,[8] he stresses the fact that Mr. Justice Holmes concurred only "in the result", arguing from this that the case is not decisive on the issue presented. Though petitioner seeks to read into Mr. Justice Holmes' failure to join in the main opinion a repudiation of its principle, his view on this matter can clearly be discovered in his dissent in *Kepner* v. *United States*, 195 U. S. 100, 134–137, decided a year before *Trono*.

In *Kepner*, which, as previously noted, also arose in the Philippine Islands, the Court held that a defendant who had been acquitted in the court of first instance could not be found guilty and sentenced by an appellate court. Mr. Justice Holmes (with whom concurred Mr. Justice White and Mr. Justice McKenna) dissented. Mr. Justice Holmes observed at the outset (195 U. S. at 134) that—

> The case is of great importance, not only in its immediate bearing upon the administration of justice in the Philippines, but, since the words

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decide whether the constitutional jeopardy provision would have become part of the law of the Islands without congressional legislation. In any event, the Court there, as it subsequently pointed out in *Trono* (199 U. S. at p. 529), regarded the legislative jeopardy provision as *in pari materia* with the jeopardy provision of the United States Constitution from which it was taken.

[8] Mr. Justice Harlan wrote one dissenting opinion, Mr. Justice McKenna joined Mr. Justice White in another dissenting opinion, and the Chief Justice merely "dissented".

used in the Act of Congress are also in the Constitution, even more because the decision necessarily will carry with it an interpretation of the latter instrument.

He then went on to say:

> * * * logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already has been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree, *United States* v. *Perez,* 9 Wheat. 579; see *Simmons* v. *United States,* 142 U. S. 148; *Logan* v. *United States,* 144 U. S. 263; *Thompson* v. *United States,* 155 U. S. 271, or notwithstanding their agreement and verdict, if the verdict is set aside on the prisoner's exceptions for error in the trial. *Hopt* v. *People,* 104 U. S. 631, 635; 110 U. S. 574; 114 U. S. 488, 492; 120 U. S. 430, 442; *United States* v. *Ball,* 163 U. S. 662, 672. He even may be tried on a new indictment if the judgment on the first is arrested upon motion. *Ex parte Lange,* 18 Wall. 163, 174; 1 Bish. Crim. Law (5th ed.), § 998. I may refer further to the opinions of Kent and Curtis in *People* v. *Olcott,* 2 Johns. Cas. 301; S. C., 2 Day, 507, n.; *United States* v. *Morris,* 1 Curtis, 23, and to the well-reasoned decision in *State* v. *Lee,* 65 Connecticut, 265.
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> If a statute should give the right to take exceptions to the Government, I believe it would

be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm. It cannot matter that the prisoner procures the second trial. In a capital case, like *Hopt* v. *People,* a man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights. *Thompson* v. *Utah,* 170 U. S. 343, 353, 354. Usually no such waiver is expressed or thought of. Morever, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.

It might be said that when the prisoner takes exceptions he only is trying to get rid of a jeopardy that already exists—that so far as the verdict is in his favor, as when he is found guilty of manslaughter upon an indictment for murder, according to some decisions he will keep it and can be retried only for the less offense, so that the jeopardy only is continued to the extent that it already has been determined against him, and is continued with a chance of escape. I believe the decisions referred to to be wrong, but, assuming them to be right, we must consider his position at the moment when his exceptions are sustained. The first verdict has been set aside. The jeopardy created by that is at an end, and the question is what shall be done with the prisoner. Since at that moment he no longer is in jeop-

ardy from the first verdict, if a second trial in the same case is a second jeopardy even as to the less offense, he has a right to go free. In view of these difficulties it has been argued that on principle he has that right if a mistake of law is committed at the first trial. 1 Bish. Crim. Law (5th ed.), §§ 999, 1047. But even Mr. Bishop admits that the decisions are otherwise, and the point is settled in this court by the cases cited above. That fetish happily being destroyed, the necessary alternative is that the Constitution permits a second trial in the same case. The reason, however, is not the fiction that a man is not in jeopardy in case of a misdirection, for it must be admitted that he is in jeopardy, even when the error is patent on the face of the record, as when he is tried on a defective indictment, if judgment is not arrested. *United States* v. *Ball*, 163 U. S. 662. Moreover, if the fiction were true, it would be equally true when the misdirection was in favor of the prisoner. The reason, I submit, is that there can be but one jeopardy in one case. I have seen no other, except the suggestion of waiver, and that I think cannot stand.

If what I have said so far is correct, no additional argument is necessary to show that a statute may authorize an appeal by the Government from the decision by a magistrate to a higher court, as well as an appeal by the prisoner. * * * For the reasons which I have stated already, a second trial in the same case must be regarded as only a continuation of the jeopardy which began with the trial below. [Emphasis added.]

It is apparent, therefore, that Mr. Justice Holmes concurred in the result in *Trono*, not because he repudiated the principles stated in Mr. Justice Peckham's opinion, but because rejection of the "limited waiver" doctrine would follow, *a fortiori*, from his view, expressed in *Kepner*, that double jeopardy did not apply to a retrial of the same case.

As the majority opinion below points out (R. 174–175), there is every indication—including his observations in the *Kepner* case—that Mr. Justice Holmes agreed with the basic rule laid down in the opinion of Mr. Justice Peckham in *Trono*.[9] He cited *Trono* two years later in writing the opinion of the Court in *Flemister* v. *United States*, 207 U. S. 372, for the proposition that a defendant who sought review of

[9] Even the minority view in *Trono* lends no support to petitioner's position in this case. It was based on the theory that "a defendant should not be required to give up the protection of a just (it must be so regarded for the sake of the argument) acquittal of one crime as the price of obtaining a review of an unjust conviction of another crime"; *i. e.*, that the defendant by appealing waived only the particular degree of jeopardy in which his conviction for the lesser offense had placed him, and not a higher degree (199 U. S. at p. 539). Mr. Justice McKenna expressed the view that an "accused would not purposely and consciously appeal from an acquittal of a grave crime and cast from himself the immunity that such an acquittal gives him." (199 U. S. at pp. 538–539.) As pointed out at the outset, that rationale does not apply here. Petitioner appealed from his conviction on the theory that the lesser degree of the offense had been improperly before the jury; he consciously sought a retrial, if a retrial was to be had, only for the greater offense. He therefore did not limit his waiver of jeopardy only to the degree of the offense for which he had previously been convicted. Moreover, on the particular facts of this case, as noted *supra* at p. 23 fn. 4, there has not been a "just * * * acquittal" of the higher crime.

his conviction to the Supreme Court of the Philippines was not put twice in jeopardy when he was reconvicted under another section of the penal code and sentenced to a greater punishment for the same acts. And his position is further evidenced by the fact that he joined in this Court's unanimous opinions in *Brantley* v. *State of Georgia,* 217 U. S. 284, and *Stroud* v. *United States,* 251 U. S. 15, 18, which, as we show *infra,* pp. 37–39, bear on the same issue.

2. The rationale of the *Trono* decision finds support in prior and subsequent federal rulings.

As was pointed out in *Trono,* the principle that an accused in procuring a new trial by his appeal waives his immunity to second jeopardy as to all grades of the offense necessarily included within the charge of the indictment (199 U. S. at p. 532) "was in substance decided in *United States* v. *Harding et al.,* tried in the United States Circuit Court in 1846, 26 Fed. Cas. 131 [Fed. Cas. No. 15,301], before Mr. Justice Grier, then a member of this court." In the *Harding* case the defendants Grimes and Williams were indicted for murder, but were found guilty of manslaughter. After verdict they moved for a new trial on the ground *inter alia* that the verdict was against the weight of the evidence. Subsequent to this argument the district judge died, and defendants applied for similar relief to the Circuit Court. The circuit judges deemed themselves unqualified to pass on the merits of the application, not having had access to the unrecorded evidence, but allowed the defendants to elect whether they wanted to abide by their former con-

victions or to take a new trial under the following admonishment of Mr. Justice Grier (26 Fed. Cas. at pp. 138–139):

> GRIER, *Circuit Justice*, then addressed Grimes and Williams as follows: William Grimes and John Williams—You ought clearly to understand and weigh well the position in which you now stand. You have been once tried and acquitted of the higher grade of offence charged against you in this indictment, the penalty affixed to which is death; but you have been convicted of the minor offence of manslaughter. Your lives have been in jeopardy, and you have escaped. The constitution of your country declares that "no person shall be twice put in jeopardy of life or limb for the same offence." This is to shield you against oppression and injustice, and puts it out of the power of the court to subject you to the danger of another trial, except at your election and request. We believe that you have a right to waive the protection thrown around you by the constitution, for the sake of obtaining what may seem to you a greater good. But let me now solemnly warn you to consider well the choice you shall make. Another jury instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeit to the law. If you choose to run this risk, and to again put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record, the court will hold you forever after estopped to allege that your consti-

> tutional rights have not been awarded to you.
>
> Before we enter of record an order for a new trial as to you, we will give you one week to ponder carefully on this subject, and consult with your counsel as to what will be your safest and best course.

Following *Trono*, the case of *Brantley* v. *State of Georgia*, 217 U. S. 284, came to this Court on writ of error to the Supreme Court of Georgia. Brantley had been indicted for murder, but convicted of voluntary manslaughter, and secured a reversal on appeal. On the retrial he claimed that the prior verdict found him not guilty of murder, and therefore that he could not be again put on trial for murder, but only for manslaughter. The Supreme Court of Georgia affirmed the judgment below which had sustained a demurrer to the plea, basing its decision on the views expressed in *Trono* and alternatively on its construction of the state constitution which provided that "[n]o person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his or her own motion for a new trial after conviction, or in case of mistrial." *Brantley* v. *State*, 132 Ga. 573, 578, 64 S. E. 676. That court also rejected Brantley's contention that such a result would be contrary to the former jeopardy clause of the Fifth Amendment to the United States Constitution, either as a direct limitation on state action or as part of the due process secured to the defendant by the Fourteenth Amendment (*Ibid.*, p. 679). This Court in affirming the judgment disposed of this constitutional issue as follows (217 U. S. at p. 285), "The contention is ab-

solutely without merit. It was not a case of twice in jeopardy under any view of the Constitution of the United States." Since at that time this Court had not as yet resolved the issue of whether the prohibition against double jeopardy contained in the Fifth Amendment was made applicable in equal degree to state prosecutions by virtue of the due process clause of the Fourteenth Amendment (see *Dreyer* v. *Illinois*, 187 U. S. 71, 8 ; *Palko* v. *Connecticut*, 302 U. S. 319 [10]), the *Brantley* decision necessarily is a holding that under any construction of the United States Constitution in this respect (*i. e.*, whether state action was or was not limited by the jeopardy clause of the Fifth Amendment), Brantley was not twice put in jeopardy under the facts of that case.

While in other decisions this Court has adhered to the general principle established in *Trono* that a defendant may waive his immunity to double jeopardy by seeking review of his conviction (*Stroud* v. *United States*, 251 U. S. 15, 18; *Bryan* v. *United States*, 338

[10] In the *Palko* case, decided in 1937, the state had taken an appeal from a conviction of murder in the second degree pursuant to a state statute allowing appeal by the state in criminal cases when permitted by the trial judge, for correction of errors of law. Upon retrial, the accused was convicted of murder in the first degree and sentenced to death. This Court, in an opinion written by Mr. Justice Cardozo, held that, even if it were assumed that the prohibition of double jeopardy in the Fifth Amendment applied to jeopardy in the same case obtained at the instance of the government rather than the defendant, a like prohibition would not necessarily be applicable against state action by force of the Fourteenth Amendment. Cf. *Brock* v. *North Carolina*, 344 U. S. 424, 426–427.

U. S. 552; and see *Sapir* v. *United States*, 348 U. S. 373, 374 (concurring opinion of Mr. Justice Douglas); *Francis* v. *Resweber*, 329 U. S. 459, 462 (opinion of Mr. Justice Reed)), it has not again had the occasion to reconsider the specific principle that a defendant, in appealing a judgment, waives jeopardy as to all degrees of the crime included within the charge of the indictment under which he was first tried.[11] The lower courts have followed this Court's *Trono* decision where the issue was presented, without questioning its rationale (*Carbonell* v. *People of Porto Rico*, 27 F. 2d 253 (C. A. 1); *United States* v. *Gonzales*, 206 Fed. 239 (W. D. Wash.)).

3. While the state decisions are divided on the issue, roughly half of the jurisdictions[12] adhere to the view that, where on a trial for murder the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, the effect

[11] See, however, Justice Douglas' concurring opinion in *Sapir* v. *United States*, 348 U. S. 373 (1955), a recent decision concerning the propriety of a new trial after a conviction for the same offense had previously been reversed for lack of evidence. Justice Douglas concluded that a court of appeals grant of a new trial on the government's motion, after initially ordering dismissal of the indictment for lack of evidence, violated the Fifth Amendment double jeopardy protection. But he distinguished two situations in which a new trial after reversal for lack of evidence might have been appropriate. Citing *Trono*, he reasoned that if the defendant himself asks for a new trial he "opens the whole record for such disposition as might be just." *Id.* at 374. "Moreover," he continued, "a reversal by the appellate court on a ground of *error that infected the trial* would also be different, as *Palko* v. *Connecticut* * * * shows." *Ibid.* [Emphasis added.]

[12] Note, 66 Yale L. J. 592, 593 (February 1957); Note, 71 U. S. L. R. (N. Y. L. R.) 421, 422.

of granting a new trial on the defendant's motion is to set aside the whole verdict and leave the case for retrial upon the same issues as upon the first trial.[13] The rationale of these decisions has been explained as follows (*State* v. *Bradley, supra,* 32 Atl. at pp. 240–241):

> They say that the necessary result of reversing the judgment and granting a new trial is to set aside the whole verdict, and that, having been done at the instance of the accused, it can neither operate as an acquittal nor a bar to the further prosecution of any part of the crime charged; that, the verdict being set aside, it leaves at issue and undetermined the question

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[13] *E. g., Bohanan* v. *State*, 18 Neb. 57, 24 N. W. 390, dimissal of writ of error refused in 118 U. S. 231; *Gibson* v. *Somers*, 31 Nev. 531, 103 Pac. 1073; *State* v. *Gillis*, 73 S. C. 318, 53 S. E. 487; *State* v. *Ash*, 68 Wash. 194, 122 Pac. 995; *State* v. *Kessler*, 15 Utah 142, 49 Pac. 293; *State* v. *Bradley*, 67 Vt. 465, 32 Atl. 238; *Commonwealth* v. *Arnold*, 83 Ky. 1, 5–6; *Hoskins* v. *Commonwealth*, 152 Ky. 805, 154 S. W. 919; *State* v. *Behimer*, 20 Ohio St. 572; *Kansas* v. *McCord*, 8 Kan. 232; *Perdue* v. *State*, 134 Ga. 300, 67 S. E. 810; *Brantley* v. *State*, 132 Ga. 573, 64 S. E. 676, affirmed, 217 U. S. 284; *Jones* v. *State*, 144 Miss. 52, 109 So. 265; *Watson* v. *State*, 26 Okl. Crim. Rep. 377, 224 Pac. 368; *People* v. *Palmer*, 199 N. Y. 413, 419, 17 N. E. 213; and see collected cases: 59 A. L. R. 1160; 1 Wharton *Criminal Law*, Sec. 397, p. 560 (12th ed. 1932); Note: 71 U. S. L. R. (N. Y. L. R.) 421, 423; Administration of the Criminal Law, A. L. I. (1935 draft) pp. 116–125, and see Miller, *Criminal Law* (Hornbook Series, 1934), p. 543: "Where however, the defendant has secured a reversal of the judgment on conviction and an order for a new trial, he may be tried again on the original indictment for the greater offense charged therein, even though he was convicted on the first trial of a constituent crime of lesser degree. * * * This result follows from the fact that in the latter case there is but a single jeopardy until the case under the original indictment is again tried, defendant's act in securing a new trial being said to constitute a waiver."

> of the homicide, and also the question of whether the accused committed it, if one was committed; that, on the retrial on a plea of not guilty, the legal presumption of innocence prevails, and the state is bound to prove every essential fact; that the only effect, therefore, that can be given to the part of the verdict that acquitted the accused of murder in the first degree after the rest of it has been set aside is to regard it as finding the quality of an act, the existence of which is undetermined, which would be a verdict to the effect that, if the accused committed the homicide, it was not such a killing as made it murder in the first degree, which would be untenable, as there can be no legal determination of the character of the malice of the accused in respect to a homicide that he is not found to have committed, or, rather, of which, under his plea, he is presumed to be innocent. A verdict of murder in the second degree is only an implied acquittal of murder in the first degree; and, if the verdict from which the inference is drawn is set aside, nothing remains to sustain the inference, and the verdict and its incidents fall together, and the indictment is left to stand as to the crime of which the accused was convicted as though there had been no trial. * * *

Those cases which adopt the "limited waiver" doctrine do so either on the basis of a construction of a jeopardy provision contained in a state constitution,[14] a specific statute embodying the "limited

[14] *E. g., State, ex rel., Landis* v. *Lewis*, 118 Fla. 910, 160 So. 485; *State* v. *Harville*, 173 La. 660, 138 So. 435.

waiver" doctrine,[15] or on the general theory that a conviction of a lesser offense on the first trial is necessarily an acquittal of the higher degree of the offense charged.[16] Under this theory, many courts hold that, although a new trial may be brought under the original indictment charging the higher degree of the crime, and new evidence may be introduced to show that the defendant committed the higher degree of the crime, his second conviction must be limited to the degree of the offense of which he was originally convicted, *i. e.*, a finding that the defendant did not commit the crime for which he was brought to trial but a lesser offense included within that charge. See 4 Warren, *Homicide,* Sec. 390, pp. 672–674; Administration of the Criminal Law, A. L. I. (1935 draft), pp. 123–124; and see *Taylor* v. *Commonwealth,* 186 Va. 587, 43 S. E. 2d 906.[17] These cases apparently

[15] *E. g. Cornelius* v. *State*, 54 Tex. Cr. App. 173, 112 S. W. 1050; *Taylor* v. *Commonwealth*, 186 Va. 587, 43 S. E. 2d 906.

[16] *E. g. Hearn* v. *State*, 205 S. W. 2d 477 (Ark.).

[17] The *Taylor* case illustrates the anomolous result obtained in the application of "limited waiver" rule. There, the accused was indicted for murder, was found guilty of involuntary manslaughter, and then took an appeal on the basis of an erroneous instruction given the jury. Under a Virginia statute incorporating the "limited waiver" doctrine as the law of the state, he was thereby acquitted of all greater degrees of homicide. He was again brought to trial *under the same indictment*, and even though on the second trial the state's evidence tended to prove first degree murder with no ameliorating circumstances (which would justify a finding in a lower degree), he was again convicted of involuntary manslaughter under instructions of the court limited to the law of that offense, and his conviction was sustained by the Supreme Court of Appeals of Virginia. And see *People* v. *McFarlane*, 138 Cal. 481, 71 Pac. 568 (conviction of manslaughter upheld though only evidence indicated premeditated murder).

assume, in contrast to the federal rule (*United States* v. *Ball*, 163 U. S. 662, 669; *Stroud* v. *United States*, 251 U. S. 15), that the prohibition against double jeopardy is a limitation on punishment and not merely to the bringing of successive charges of the same crime.

Other cases apparently hold that the defendant may not even be retried under the original indictment but are generally silent as to how the new trial may be instituted. Administration of the Criminal Law, A. L. I., *supra* (pp. 124–125).

In the face of this conflict of state authorities, the American Law Institute has consistently recommended the rule of the *Trono* case as a rule of general application. See Code of Criminal Procedure, A. L. I. (March 16, 1931), Sec. 368; Administration of the Criminal Law, A. L. I. (1935 draft of proposed Act on Double Jeopardy), Sec. 14. Section 1.09 (1) of its more recent Model Penal Code (Tentative Draft No. 5, April 27, 1956) specifically provides that "[a] finding of guilty of a lesser included offense which is subsequently set aside is not an acquittal of the greater inclusive offense." In its comment on this provision, the draft states (*Ibid.* pp. 48–49):

> (4) The draft provides that a conviction of a lesser offense is not an acquittal of the greater inclusive offense. The question is presented when either the defendant or the state appeals and obtains a reversal of the conviction of the lesser offense and, upon the new trial, the state again charges the defendant with the

greater offense. Present authority is conflicting. See A. L. I., Double Jeopardy, (1935) section 14 and commentary at p. 116.

The problem arises most frequently in homicide cases. Courts which hold that a finding of guilty of a lesser included offense which is later set aside nevertheless constitutes a bar to a subsequent prosecution for the higher offense vary in their reasons for reaching that conclusion. * * * In those few jurisdictions whose courts base their decision on constitutional grounds adoption of the draft would presumably require constitutional amendment.

In most cases the circumstances surrounding the reversal of the conviction of the lesser offense make it undesirable to preclude subsequent prosecution for the greater inclusive offense. In those cases where the state obtains a reversal on the ground of prejudicial error at the first trial it is obviously desirable that a prosecution for the greater offense be allowed. The case where the defendant procures the reversal is less obvious. *Where he procures the reversal on the ground that his conduct, though it constitutes the greater offense, does not constitute the lesser offense, subsequent prosecution for the greater offense is certainly warranted.* [Emphasis added.]

The last sentence directly applies to this very case.

This proposed legislation, based on more than fifteen years of study by the American Law Institute, represents an informed judgment, on the working of the conflicting rules, in favor of the present federal rule.

4. The "limited waiver" would, in application, make inroads on the independence of the jury at the second trial.

The assumption that a jury tacitly acquits the accused of the greater degree of crime by rendering a verdict in a lesser degree is not a demonstrated truth. A jury "has the power to bring in a verdict in the teeth of both law and facts" (*Horning* v. *District of Columbia,* 254 U. S. 135, 138), and their findings may be based more on sympathy or compromise, than rigid adherence to the law (*Dunn* v. *United States,* 284 U. S. 390, 393–394).[18] Where, as here, the first verdict was reached after an erroneous instruction to the jurors that they might find the defendant guilty of the lesser crime, it is particularly true that the error tainted the entire verdict; that the Government, as well as the defendant, was prejudiced by the error; and that the consequence of a reversal of the conviction at the defendant's behest should be to permit a retrial of the original charge, free of such error, rather than to insist that the error be perpetuated.

The "limited waiver" theory, moreover, requires the courts to credit not what the first jury actually decided, but what it left unsaid for reasons known

[18] As we have observed, *supra*, p. 23, fn. 4, such possibility exists in the instant case where the first jury found petitioner guilty of arson in the first count and a homicide arising out of the same circumstances in the second. Since the sum total of the facts comprising these two crimes established felony murder, it cannot reasonably be supposed that the jury intended to acquit petitioner of causing the death of the victim in perpetrating arson. It is reasonable to believe that the jury had some motive other than legal consistency—such as sympathy for the petitioner—in reaching its verdict.

only by that jury. It imposes upon the second jury a limitation, arising not from its judgment as to the facts but from the inarticulated conclusions of another jury, not necessarily based on the same evidence.[19]

The verdict rendered on the first trial cannot at the same time be a nullity insofar as it purports to assess a defendant's criminal responsibility for the lesser crime and also constitute a finding that, if he did commit the crime charged, he committed it under ameliorating circumstances which would not justify the imposition of the greater penalty—*i. e.*, there is no proper finding that the defendant murdered the victim, but if he did, it was murder in the second degree.

Whether it be assumed that an accused "waives" his jeopardy by seeking a new trial on the indictment, or whether by appealing he merely extends the original jeopardy to the conclusion of the unresolved case (cf. *Kepner* v. *United States*, 195 U. S. 100, 134, dissenting opinion of Mr. Justice Holmes, *supra*, pp. 31–33), the result is that when he seeks reversal and thereby

[19] To demand that the new trial be instituted under a new indictment rewritten to conform to the lower offense found by the previous jury would place a limitation on the grand jury, especially in those circumstances where the evidence presented to the grand jury is consistent only with proof of the higher degree of the crime. Frequently, moreover, the government is able to procure new evidence of a crime after the first trial. In such cases the application of the "limited waiver" theory would place an artificial stricture on the power of both the grand jury and the new petit jury to weigh evidence not available on the first trial against the charge of the indictment. They would be forced, in effect, to accept a prejudgment of part of the case which might be wholly inconsistent with the evidence presented to them. See fn. 17, *supra*, p. 42.

obtains a new trial he again puts at issue the facts pleaded in the indictment, and renders himself vulnerable to the legal consequences which may flow from a verdict of guilt if the truth of those facts is demonstrated to the second jury. The judgment of the second jury, on the facts before it, ought not to be restricted by speculation as to what the previous jury had concluded in arriving at a verdict on the facts presented to it.

In any event, there are two premises essential to the application of the "limited waiver" doctrine—(1) that, by being convicted of a lesser included offense, the defendant has been acquitted of the greater offense which requires proof of a higher order of criminal intent or of additional facts, and (2) that, in appealing his case, the defendant must be deemed to have intended to waive his immunity to second jeopardy only to the extent of being retried for the degree of crime specified in the previous verdict. As we have demonstrated, neither premise is justifiable in the circumstances of this case, so that the theory of "limited waiver" cannot properly be applied here.

II

PETITIONER'S CONVICTION OF ARSON ON THE FIRST TRIAL WAS NOT A BAR TO HIS RETRIAL FOR FELONY MURDER

Petitioner's contention that his unappealed conviction for arson on the first count of the indictment precludes his retrial for first degree murder on count two is grounded on the false premise that a person may not twice be put in jeopardy for one transaction. He argues that, since there was only one act of arson,

an unappealed conviction of arson bars a subsequent trial for first degree murder arising out of the arson (Pet. Br. 22–25), thereby stressing the act done rather than the nature of the offenses committed. It is, however, well established in federal law that, where different proof is required for each offense, a single act or transaction may violate more than one criminal statute. *Pereira* v. *United States,* 347 U. S. 1, 9; *United States* v. *Beacon Brass Co.,* 344 U. S. 43, 45; *United States* v. *Michener,* 331 U. S. 789; *Pinkerton* v. *United States,* 328 U. S. 640, 643–644; *Blockburger* v. *United States,* 284 U. S. 299, 304; *Gavieres* v. *United States,* 220 U. S. 338, 342; *Carter* v. *McClaughry,* 183 U. S. 365; *District of Columbia* v. *Buckley,* 128 F. 2d 17, 19–20 (C. A. D. C.), certiorari denied, 317 U. S. 658.

As we show *infra,* the crime of arson is not a lesser included offense of first degree murder under the laws of the District of Columbia. The offense of arson is not identical with that of murder committed through the perpetration of arson, and the two crimes cannot "necessarily" be proved under the same evidence. (Rule 31 (c), F. R. Cr. P. *supra,* p. 4.) Hence, the two offenses are separate and distinct.

A. ARSON IS NOT A LESSER INCLUDED OFFENSE IN FELONY MURDER

1. The gravamen of the crime of felony murder is the homicide. Proof of the felony is simply "the element of proof which is necessary in order to convert the killing * * * into first degree murder" and which under the statute supplies "that degree of malice which is indispensable to murder in the first

degree". *Wheeler* v. *United States,* 165 F. 2d 225 299 (C. A. D. C.), certiorari denied, 333 U. S. 829; *Goodall* v. *United States, supra* (180 F. 2d 397 (C. A. D. C.), at pp. 399–400). Arson is not therefore an integral element of murder, but is only a collateral evidentiary fact admissible under the common law (*infra*), and now, by statute, as part of the *res gestae* on the issue of felonious intent. Cf. *State* v. *Barton,* 5 Wash. 2d 234, 105 P. 2d 63, 66; 1 Wharton, *Criminal Evidence* (12th ed. 1955), pp. 508–509. And cf. *Lovely* v. *United States,* 169 F. 2d 386, 388 (C. A. 4).

At common law there was but one crime of murder, admitting of no degrees; and it included killings committed during a felony, malice being implied from the intent to commit the felony. 4 Blackstone *Commentaries* 190, 199–200. It was unnecessary to charge the felony; it was sufficient to charge murder in the common form, and then, upon proof that it was committed in the perpetration of a felony, malice, deliberation, and premeditation were implied. Wharton, *Homicide* (3d ed. 1907), Sec. 574; see also I Wharton, *Criminal Law* (12th ed. 1932), Sec. 520; *Davis* v. *Utah Terr.,* 151 U. S. 262, 266–270.

The District of Columbia first degree murder statute is declaratory of the common law in this respect (*Fisher* v. *United States,* 328 U. S. 463, 473; *Bishop* v. *United States,* 107 F. 2d 297, 301 (C. A. D. C.); *Lee* v. *United States,* 112 F. 2d 46, 49 (C. A. D. C.)). In defining the statutory crime of first degree murder, Congress created only one crime which would be punishable where, under the evidence, there was premedi-

tation or where, as under the common law, there was a homicide committed in perpetrating a felony, from which fact deliberation and malice would be presumed. As before, under an indictment in the common-law form for murder in the first degree, the prosecution may prove facts to bring the case within any of the provisions of the statute defining murder in the first degree. It is not even necessary to allege the fact of a felony in order to introduce proof that the killing was perpetrated in the course of the commission of a felony. *Burton* v. *United States,* 151 F. 2d 17 (C. A. D. C.), certiorari denied, 326 U. S. 789.[20] It is therefore apparent that first degree murder does not include as an integral component the crime of arson.

2. Indeed, one of the conditions of felony murder is that the elements of the felony must be so distinct from those of the homicide as not to be an ingredient of the homicide. *People* v. *Hater,* 184 N. Y. 237, 77 N. E. 6; *People* v. *Spohr,* 206 N. Y. 516, 100 N. E. 444. Many violent murders involve the felony of assault, and yet every such murder does not constitute a first degree felony murder; the assault is usually deemed to merge into the homicide.[21] The rationale

[20] Presumably also an accused could be charged in a single first degree murder count both with premeditation and with killing in perpetrating one or a number of felonies and the charge would not be duplicitous, since only one crime would be charged, murder in the first degree. *State* v. *Barton,* 5 Wash. 2d 234, 105 P. 2d 63, 66.

[21] Even the crime of assault, however, sometimes can supply the felonious intent factor in felony murder. If, for example, A were committing a felonious assault on B, and C intervened and was killed, A would be guilty of felony murder, at least

of this principle has been explained as follows (Arent and MacDonald, *The Felony Murder Doctrine and its Application under the New York Statutes*, 20 Cornell L. Q. 288, 298–299, footnotes omitted):

> Every time a homicide which is not justifiable or excusable is committed, the killer may be said to have been engaged in a felony. To hold him guilty of felony murder, however, would eliminate all existing distinctions between murder and manslaughter and their various degrees. A necessary qualification of the felony murder rule, therefore, is that the felony in which the defendant was engaged must have been independent of the homicide. For a number of years the New York courts struggled with the question whether the felony murder theory could ever be applied where the acts of violence which constituted the felony were the very acts which caused the death. In *Buel* v. *People* it was finally established, however, that a felony murder conviction may be based upon an attempt at rape, even though death was caused by the acts of violence which constituted the felonious attempt, the court pointing out that "While force and violence constitute an important element of the crime of rape, they do not constitute the entire body of that offense." From this developed the present rule that although there need be no acts collateral to or independent of those which caused death, the elements constituting the underlying felony must be so distinct from those

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under the comparable New York statute. See *People* v. *Wagner*, 245 N. Y. 143, 156 N. E. 644; Corcoran, *Felony Murder in New York*, 6 Fordham L. R. 43, 48 (and cases cited).

> of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder.

Another writer has stated the rule thus (Corcoran, *Felony Murder in New York,* 6 Fordham L. R. 43, 49, footnotes omitted):

> In order, therefore, to constitute a felony murder the elements of the felony must be so distinct from those of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder. But the killing of a woman during the commission of rape is felony murder. The reason for this is that although violence is an essential ingredient of this felony, there is, in addition to the violence, an element neither essential nor common to homicide, that is, sexual intercourse. If, then, the accused was engaged in the commission of rape, a homicide by him, either of the victim of the rape or of a third party intervening as a rescuer, is felony murder.

And see Wechsler and Michael, *A Rationale of the Law of Homicide,* 37 Col. L. R. 701, 715–716 (1937).

In those cases of felony murder where the felony relied on is a crime against the person of another, it is not essential that the victim or intended victim of the felony be the same as the victim of the homicide, so long as both crimes arise from one criminal scheme. *Carter* v. *United States,* 223 F. 2d 332 (C. A. D. C.), certiorari denied, 350 U. S. 949; *United States ex rel. Almeida* v. *Baldi,* 195 F. 2d 815 (C. A. 3), certiorari denied, 345 U. S. 904; *Commonwealth* v. *Almeida,* 362 Pa. 596, 68 A. 2d 595, certiorari denied, 339 U. S. 924;

Commonwealth v. *Lessner,* 118 Atl. 24 (Pa.); *People* v. *Wagner,* 245 N. Y. 143, 156 N. E. 644. If, for example, A, in the course of robbing B, kills C, he can be tried for the murder of C, and then be tried for the robbery of B arising out of the same transaction. In such a case, it is obvious that the robbery (of B) would not be a constituent offense of the felony murder (of C), although proof of the robbery of B would be essential to raise the crime to first degree murder as to C.

Since arson is even less related to the crime of homicide than rape or robbery and other crimes of violence against the person, it could not be said to merge with first degree murder, even in those cases where the homicide resulted from, and was directly related to, the arson. On a charge of felony murder, the jury would not be entitled to return a verdict for the arson alone. Cf. *Warren* v. *State,* 79 Neb. 526, 113 N. W. 143.

B. THE ELEMENTS OF THE OFFENSE OF ARSON AND OF FELONY MURDER ARE SEPARATE AND DISTINCT

It follows from the principles discussed above as to lesser included offenses that arson is a wholly separate offense from felony murder. The elements of the offense, and not the facts of a particular trial, are determinative on issues of double jeopardy. *Pinkerton* v. *United States,* 328 U. S. 640, 643–644; *Blockburger* v. *United States,* 284 U. S. 299, 304.

Arson is a crime against property; murder a crime against the person. As shown above, the felony is not an element of the offense of felony murder; it is

merely a means of proving one element of the offense—felonious intent. Hence, under established principles—since the elements of each offense are different—the offenses are distinct.

While an acquittal of the charge of arson might have been *res judicata* of that evidentiary fact necessary to proof of murder in the first degree (*Sealfon* v. *United States*, 332 U. S. 575), an unappealed conviction of arson will not support the plea of *autrefois convict* on the retrial of the homicide charge. Compare *Carter* v. *United States*, *supra* (223 F. 2d 332 (C. A. D. C.)); *People* v. *Townsend*, 214 Mich. 267; *State* v. *Moore*, 33 S. W. 2d 905, 326 Mo. 1199; *Commonwealth* v. *Maguire*, 48 N. E. 2d 665 (Mass.); *Durall* v. *State*, 111 Ohio St. 657, 146 N. E. 90. See Administration of the Criminal Law (A. L. I. Official Draft of 1935 Double Jeopardy Statute), *supra*, Sec. 20, "[w]here a severer penalty is prescribed for a homicide because it is committed in the commission of or the attempt to commit another offense a conviction of a person of such other offense is not, subject to the provisions of § 17, a bar to a prosecution of such person for the homicide". A contrary result has been reached only in those state jurisdictions employing "the same transaction" test of jeopardy (cf. *State* v. *Mowser*, 92 N. J. L. 474, 106 Atl. 416; *State* v. *Cooper*, 1 Green 361 (N. J. 1833)), a test which this Court has never adopted. Compare: *Albrecht* v. *United States*, 273 U. S. 1, 11, and cases cited *supra*, p. 48.

III

THERE WAS NO ILLEGAL DETENTION OR IMPROPER QUESTIONING

Petitioner challenges the admission into evidence, to contradict his own testimony at the trial,[22] of statements he made to police and fire inspectors while he was at the Emergency, and D. C. General, hospitals. His objection at the trial went only to statements made on May 26, the day of the fire. Through defense counsel, he specifically waived any objection to the evidence obtained during the questioning period on May 28 (R. 129).[23]

Both courts concluded, properly we submit, that the rule of *McNabb* v. *United States,* 318 U. S. 332,

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[22] Although the government witnesses testified as to petitioner's statements before petitioner's testimony was heard by the jury, "[t]he prosecution, having tried this case before, was familiar with the defense, and these assertions were offered to discredit that defense * * *" (Pet. Br. 31).

[23] See also Transcript p. 232, where, on the *voir dire*, defense counsel stated:

"* * * You see, your Honor, we haven't challenged the 28th. And as I understand the circumstances and facts regarding the taking of the statement on the 28th, they are not in law challenged. So the particular one we are challenging is the one of the 26th, which is the date of the fire. That is why I don't think we ought to take up the Court's time on the 28th, because it is unchallenged * * *."

(References to the typescript transcript of the trial will hereafter be designated "Tr.")

Petitioner singles out four assertions said to have been made by him to government witnesses as highly prejudicial (Pet. Br. 31, fn. 10). Significantly, only the first of these relates to the questioning on May 26, the day of the fire. The other three relate to May 28, and, as to this testimony, as above noted, there was no objection.

excluding confessions obtained during a period of illegal detention was inapplicable to this case. Here, there was neither unreasonable detention nor improper questioning.

Neither petitioner nor Judge Bazelon dissenting below on this issue (R. 182–187) dispute the fact that petitioner was unavailable for arraignment during the time he was questioned. He was under hospital care being treated for his injuries. The tenor of petitioner's argument, and of the dissent below, is that, even so, it was improper to question petitioner so long as he was in the custody of the authorities. This is really an argument for the rule that no person in custody may be questioned, a rule which this Court has consistently rejected. *United States* v. *Carignan,* 342 U. S. 36, 44–45; *United States* v. *Mitchell,* 322 U. S. 65, 69; *McNabb* v. *United States,* 318 U. S. 332.[24]

1. THE QUESTIONING AT EMERGENCY HOSPITAL, ON MAY 26

After his removal from the burning house, petitioner was taken by the fire rescue squad to Emergency Hospital, a private hospital in the District of Columbia, for treatment. Within a short time, Police Sergeant Couture, who had not yet ascertained the details of the fire, appeared, introduced himself, and briefly questioned petitioner for fifteen minutes, as doctors and nurses came and went. Petitioner at this time was under no restraint and had not been identi-

[24] For a general discussion of the *McNabb* rule, see the government's brief in *Mallory* v. *United States,* No. 521, this Term, at pp. 15–25.

fied as a potential suspect. The questioning was merely a routine attempt to get a report on a serious fire.

After the discovery of evidence suggesting arson, Sergeants Couture and Clarke returned to Emergency Hospital at about 10:00 a. m. to question petitioner. Even so, the record does not indicate that petitioner was questioned for purposes other than to check on information. He was not in police custody or under arrest, and had been treated for his injuries. He gave the officers an exculpatory statement, blaming the fire and the removal of the gas plug on a colored man who, he said, had attacked him. He claimed not to be able to identify the various materials found in the house after the earlier questioning by Couture.

No claim is made that any coercive methods were used. Petitioner himself testified that he was not threatened or mistreated at any time by anybody. On the trial the main thrust of his attack was the lack of reliability of what he, as an injured man, told the police officer, and not that his statements had been taken under circumstances of illegality or duress (R. 82).[25] While petitioner, in an apparent attempt

[25] See also Tr. 254, where defense counsel stated:

* * * The issue here is as to his mental and physical condition on May 26, at the time they took the statement, in order to determine whether or not under the law that statement is admissible; so what happened on the 28th doesn't help us to determine that issue as of that date * * *

With respect to this defense contention, the jury was instructed as follows (Tr. 369):

"Certain officers of the law connected with the Fire Department and Police Department of the District of Columbia have testified before this jury that on May 26, 1953, or shortly there-

to discredit the statements attributed to him by the officers, testified (R. 57–62) that he was in poor physical condition and blinded by smoke and soot during the questioning periods on May 26th, Couture sharply controverted this testimony. Couture testified that, when he had briefly questioned petitioner at 8:30 a. m. on May 26th, he was in no distress, and his conversation was normal (R. 87). His eyes were open at this time (R. 87),[26] and Couture did not notice any abnormality in his vision (R. 90–91). He was about the same at 10:00 a. m., the time of the second questioning, and he talked "good" (R. 98).[27] Dr. Brooks of the D. C.

---

after the defendant made certain oral statements. The jury are instructed that such oral statements, if freely and voluntarily made by the defendant, *at a time when the defendant was possessed of his senses and knew what he was saying and doing*, should be considered and weighed by the jury in connection with all other evidence in the case as bearing upon the question of the defendant's guilt or innocence. *You are advised that such evidence was received by the Court with caution and should be considered and weighed by the jury with caution.*" [Emphasis added.]

The court went on to elaborate to the jury the requirement that, before considering any statements of the defendant, they must find that they were freely and voluntarily made by him and not the result of coercion. No objection was made to this instruction.

[26] Green told the jury that his eyes were washed out prior to the arrival of Couture, and he looked at the clock and observed that it was then 8:30 a. m. (R. 141). Later in his testimony he said that his eyes had not been washed out when Couture arrived and that he could not open them (R. 145). When questioned as to this discrepancy, he then said it might have been 9:00 a. m. before his eyes were washed out (R. 146).

[27] Sergeant Clarke testified that his chest wounds had been bandaged by this time (R. 126, 137–138).

General Hospital testified that petitioner had sustained only superficial wounds and the effects of smoke inhalation, and made no mention of any eye irritation in his diagnosis (R. 62–68). Petitioner was able on the trial to recount, as to each occasion when he was questioned, the substance of what he told the officers (which did not differ materially from their version of what he said) (R. 61, 146–147, 148–150). Thus, he was fully conscious of what he was saying.

Under the circumstances, there is nothing in either the time or manner of this questioning which violates the standards of proper investigatory behavior or the specific requirements of the *McNabb* rule.

2. THE QUESTIONING AT D. C. GENERAL HOSPITAL, ON MAY 26

The main thrust of petitioner's *McNabb* argument relates to the questioning by Fire Inspector Kelly at 3:00 p. m. on May 26, after petitioner had been taken by ambulance to the public D. C. General Hospital. Petitioner was placed in a large locked ward with about a dozen other patients, a policeman standing at the ward door. Fire Inspector Kelly, accompanied by Fire Marshal Roberts, came to the hospital at 3:00 p. m. or later, for the purpose of obtaining information from the only person who was known to have direct knowledge of the fires. Before questioning petitioner, Kelly obtained his permission, the permission of a policeman, and of the ward nurse. Kelly shook hands with him, and used no coercive tactics in his questioning. During this time petitioner was sitting or standing. His version of the fire was generally the same as he had given Couture five hours

earlier. His account was again exculpatory, placing blame on a colored man alleged to have attacked him and to have set the fires (R. 98, 100–101, 127). Kelly testified that he was in the room an hour, although petitioner testified that he was not in there as long as three minutes (R. 62).

There is, as to this period, nothing but the fact of closer custody than at Emergency on which to predicate a *McNabb* argument. Petitioner was in no condition to be arraigned prior to this release from medical treatment. The holding was not for the purpose of questioning him as in *Upshaw* v. *United States,* 335 U. S. 410. Petitioner was, in fact, not questioned at all on May 27 when he was kept in the hospital for treatment.

The questioning, on May 26, in the presence of 12 other patients, was not secret grilling. It was admittedly noncoercive. Petitioner himself was under the impression that it was for a very short period.

Under these circumstances, the situation presented is analogous to that in *United States* v. *Carignan,* 342 U. S. 36, where the Court refused to extend the *McNabb* rule to a confession obtained from a person validly in custody under another charge. Here, petitioner was validly in limited custody for the treatment of his injuries. The brief, noncoercive questioning during that period was proper. As this Court said of the *Carignan* situation, 342 U. S. at pp. 44–45, "[t]his case falls outside the reason for the rule, *i. e.*, to abolish unlawful detention", and "[a]n extension of a mechanical rule based on the time of a

confession would not be a helpful addition to the rules of criminal evidence". And see *On Lee* v. *United States*, 343 U. S. 747, 755;—"[s]uch departures from the primary evidentiary criteria of relevancy and trustworthiness must be justified by some strong social policy". There was in this case no improper behavior which would warrant exclusion of petitioner's statements.

IV

THE PROSECUTOR'S OBSERVATIONS AS TO THE PROPER FUNCTION OF THE JURY WERE MADE IN REBUTTAL TO ERRONEOUS AND PREJUDICIAL STATEMENTS OF DEFENSE COUNSEL, AND DID NOT MISLEAD THE JURY

It is petitioner's final contention that the remarks of the prosecutor to the jury in summation of the case were improper in that they attempted to assure the jury that it did not have the final responsibility in capital cases (Pet. Br. 36–41). Considered in context, however, the remarks of government counsel merely sought to correct the misleading impression made by defense counsel that the jury had final responsibility for imposing the death penalty, and that their findings both as to the fact of the crime and the sentence of death by electrocution were final in the sense of being beyond further review by any other authority. The facts may be briefly summarized as follows:

During his summation, defense counsel Ford told the jury that their finding of fact was final and neither the Supreme Court of the United States nor anyone else (R. 153) "can hold you to their opinion

on questions of fact, for you are the sole judges of the facts". He further stated in this vein (R. 153):

> No one on the face of the earth can challenge your individual decision on what you consider the facts to be.

He then went on to give the impression that the jury was to determine whether the petitioner would be electrocuted or not.[28] Thus, he stated (Tr. 600):

> Each of you will vote on that direct issue: Is he guilty of first degree murder as charged, and then he goes to the electric chair, and nothing will stop it. It is mandatory.

He then repeated this theme several times in his argument, *e. g.*:

> [Tr. 601] * * * if after my discussion of that you come to the factual opinion that this man should not go to the electric chair * * *.
>
> [Tr. 602] * * * before I can send him to the electric chair, I have to say to myself I have no reasonable doubt about what caused the death of this lovely lady * * *.
>
> [Tr. 662] * * * even though you are morally certain that he set all the fires, you still, under our law, must say not guilty and not send him to that chair.
>
> [Tr. 605] Yes, under your solemn and sacred oath, shall I, as a juror, send that kind of a human being to the electric chair * * *.

After the latter statement, government counsel stated (Tr. 605):

[28] Prior to making this statement, defense counsel had told the jury that that day was a holy day, Ascension Thursday (Tr. 598), and he repeated this observation later in his argument (Tr. 623).

> Your Honor, I don't want to interrupt Mr. Ford, but the jury doesn't send the defendant anywhere.

Defense counsel Ford concluded his summation as follows (Tr. 624):

> First degree murders [sic] don't live the way he and that lady lived. And I am sure she herself, if she could speak to you, would tell you, For my death you are going to the electric chair? Why, he lifted me in and out of bed during the years. He fed me. He clothed me. Ladies and gentlemen, it just can't be.

The total effect of defense counsel's remarks was to create the impression in the minds of the jurors that they were to impose sentence as well as to determine the facts, and that the case in both respects ended with their verdict.

To offset this impression, government counsel told the jurors during argument in rebuttal that their duty (R. 153) "doesn't consist in sending this defendant to the electric chair", but (R. 153):

> * * * Your duty as representatives and members of this community is to sit here, listen to the facts, take the law that His Honor will give you which governs this case, and then in accordance with the facts and with the law, to reach a fair and impartial verdict based on the evidence and the law, and on nothing else.

The prosecutor explained that the sentencing authority is vested in the trial judge, that the facts of the case which determine the legitimacy of the sentence may be reviewed on appeal, and that, in addition, the possibility of executive clemency existed.

The prosecutor did not tell the jury that the responsibility for determining guilt or innocence was not theirs, but sought to explain the difference between that function, and the sentencing function. That is evidenced by his concluding remarks, (R. 154–155):

> * * * So bear in mind, ladies and gentlemen, and bear in mind your function in this case is [sic] fact-finders. You are the fact-finders. You have to decide: (1) Did Green set the fire? (2) Did Miss Betty Brown die as the result of the fire? And that ends your function in the case, and the responsibility of other people comes into it when we consider the answer or consequences as to what is going to happen to this man.
>
> * * * * *
>
> Now with this, ladies and gentlemen, I will leave the case with you.
>
> I want to emphasize again your function, your responsibility in the case. Your responsibility is to make a finding on the facts and the law as to whether or not this man set the fire and whether or not this woman died as a result of it. Your function is not to send this man to the electric chair. I want to emphasize that, ladies and gentlemen, and that should not properly be a matter for your consideration. The consequences or the result of your verdict is something that you are not concerned with or should be concerned with.
>
> As I say, there is the Judge in this case, the Court of Appeals, the Supreme Court, the President, The Attorney General, and I am sure this man's rights will be protected all the way along the line. It is the responsibility of these

> other people to decide what to do with this man and not you, and I am sure his rights will be protected all along the line.

It is pertinent to note that no objection was taken to this argument in rebuttal at the time, and although defense counsel was given an opportunity by the court to submit any further instructions, including presumably an instruction to cure this alleged error, he failed to have it corrected by the court (Tr. 645–647).

In context, the prosecutor's explanation to the jury of the relationship of their duties to the duties of the reviewing and sentencing authorities was proper. Remarks that might be considered as improper when standing alone acquire a new cast when viewed with reference to matters raised by opposing counsel's arguments. *Schino* v. *United States,* 209 F. 2d 67 (C. A. 9), certiorari denied, 347 U. S. 937; *Ochoa* v. *United States,* 167 F. 2d 341, 344, 345 (C. A. 9); *United States* v. *Johnson,* 165 F. 2d 42, 48–49 (C. A. 3), certiorari denied, 332 U. S. 852; *Springer* v. *United States,* 148 F. 2d 411, 414 (C. A. 9),

Moreover, as we have indicated, petitioner's counsel made no objection to the prosecutor's rebuttal argument nor did he ask the trial court in its instructions to correct the alleged error. It was not until the defense motions for judgment of acquittal and a new trial were made that the court's attention was called to this issue (R. 158–159). The proper time to object to a prosecutor's remarks is when they are made, so that the alleged error can, if possible, be corrected. *Crumpton* v. *United States,* 138 U. S. 361,

364; *Kreinbring* v. *United States*, 216 F. 2d 671, 673 (C. A. 8); *United States* v. *Kortepeter*, 114 F. 2d 124, 128 (C. A. 7), certiorari denied, 311 U. S. 711; *Jarvis* v. *United States*, 90 F. 2d 243, 246 (C. A. 1); *Mendelson* v. *United States*, 58 F. 2d 532 (C. A. D. C.); *McIntosh* v. *United States*, 1 F. 2d 427, 429 (C. A. 7).

In this case, where the evidence of petitioner's guilt was clear, and its sufficiency is not here challenged, the remarks of the prosecutor complained of, even if they did not correctly inform the jury as to the exact nature of appellate review, do not constitute the type of plain error which would warrant reversal under Rule 52, F. R. Crim. P. Cf. *Wheeler* v. *United States*, 190 F. 2d 663 (C. A. D. C.); *McFarland* v. *United States*, 150 F. 2d 593 (C. A. D. C.).

CONCLUSION

It is respectfully submitted that the judgment of the court below should be affirmed.

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MARCH 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957

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JOHN T. FEY, Clerk

No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1957

EVERETT D. GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

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I. THE COURT OF APPEALS HAD JURISDICTION TO REMAND THE CASE FOR A RETRIAL ON THE FIRST DEGREE MURDER CHARGE

The Court of Appeals had jurisdiction, pursuant to 28 U. S. C., Section 2106, to reverse the judgment rendered after the first trial and remand the case for such further proceedings "as may be just under the circumstances." Since the Court of Appeals held that, on the evidence presented, the crime committed could only be first degree murder, that court properly concluded that, under the circumstances, the just procedure would be to remand the case for a retrial which was

necessarily limited to the issue of first degree murder.[1] Indeed, as we have noted (original Brief for the United States, pp. 23–24, fn. 5), no other course of action had been suggested by petitioner to that court.

Petitioner now urges that the Court of Appeals lacked jurisdiction so to remand the case because there was no express statutory grant of jurisdiction to direct a new trial on the original charge when the appeal had been from a conviction of a lesser included offense. He contends that "[t]he general grant of power to a federal appellate court to remand for proceedings consistent with its decision should not be interpreted as Congressional disapproval of the majority state court rule" which rule, petitioner alleges, limited retrial to that degree of offense for which the appellant had previously been convicted. (Supp. Brief for Petitioner, pp. 3–4.) But petitioner ignores the fact that, regardless of what the practice in some states might have been,[2] no federal court has ever accepted the limited waiver doctrine and this Court explicitly rejected that doctrine in *Trono* v. *United States*, 199 U. S. 521 (Brief for the United States, pp. 26–27, fn. 6), deciding the case "as if it arose in one of the Federal courts in this country." And it is

[1] In view of the theory on which the reversal was based, the sole alternative would have been to dismiss the indictment, despite the finding of the first jury and the overwhelming evidence of guilt.

[2] In fact, the states are approximately evenly divided in accepting or rejecting the limited waiver doctrine which precludes retrial for the greater offense. Brief for the United States, p. 39.

well established that a new trial, when granted as a result of action by the defendant, sets aside the original verdict and permits such fresh disposition of the case as may be just, including possible increase in sentence if the defendant is again found guilty. See *Bryan* v. *United States*, 338 U. S. 552, 560; *Stroud* v. *United States*, 251 U. S. 15, 18; *Murphy* v. *Massachusetts*, 177 U. S. 155, 158; *United States* v. *Ball*, 163 U. S. 662, 672. There exists, therefore, no basis in federal law for concluding that the power to remand for such further proceedings as may be "just under the circumstances" did not include the power to order retrial for the greater offense.[3]

Petitioner's basic premise that retrial for the greater offense somehow is contrary to accepted concepts of American jurisprudence is a false one. When the double jeopardy provision of the Fifth Amendment was first proposed, there were some who thought it would preclude a retrial even though sought by the defendant,[4] and after the Amendment was adopted, some authorities were of the view that it

[3] Surely, *Carroll* v. *United States*, 354 U. S. 394, which held that the Government could not appeal an order granting a motion to suppress evidence, does not suggest that, in the absence of specific statutory authority, the courts of appeals could not remand cases, appealed by the defendant, for disposition in accordance with accepted federal practice.

[4] As originally proposed by Madison, the provision read "no person shall be subject * * * to more than one punishment or one trial for the same offense." 1 Annals of Congress, 1789–91, p. 433. For a summary of the early history of the double jeopardy provision, see Bigelow, *Former Conviction and Former Acquittal*, 11 Rutgers L. Rev. 487.

precluded appeal by the defendant in a criminal case.[5] English precedents were of no avail because, if an irregularity materially affecting the trial occurred to the injury of the accused, an English court would present the matter to the Crown and a pardon would generally be granted.[6] It was soon agreed that the provision against double jeopardy contained in the Fifth Amendment precluded neither appeal by a defendant nor retrial following reversal of the conviction. And no Federal court has ever held that, on remand, the defendant could not be tried on the original charge or was not subject to the maximum punishment for that offense. See Brief for the United States, pp. 25–47.[7]

Petitioner's argument that, apart from the constitutional question, the Court of Appeals lacked juris-

[5] See, *e. g., United States* v. *Gibert*, 25 Fed. Cas. 1287 (No. 15,294). Another question thought troublesome was whether retrial was permissible where the first jury failed to agree on a verdict. This question too was resolved by the federal courts by allowing retrial. *United States* v. *Perez*, 9 Wheat. 579; see *Wade* v. *Hunter*, 336 U. S. 684, 688–690.

[6] For a discussion of the early American and English practices, see *Commonwealth* v. *Green*, 17 Mass. 515.

[7] The concept that it is not a violation of double jeopardy to try a defendant twice for the same offense, where the second trial is had at his request, is reflected in Section 151 of the Civil Rights Act of 1957, 71 Stat. 634, which provides, in part:

> *Provided further, however*, That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of $300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.

diction to remand the case for retrial for first degree murder, is therefore circular. He argues that the Court of Appeals lacked jurisdiction because it had no specific statutory authority and that the power so to remand was not encompassed within its general powers because it was contrary to accepted practice. We have seen, however, that the federal courts have been consistent in allowing retrial for the greater offense, and so the practice would be an unacceptable one only if it violated some specific statutory or constitutional provision. As no such statutory prohibition exists, it is apparent that only the constitutional question is before this Court. For the reasons set forth in our principal brief, pp. 19–54, we urge that that question be resolved, consistently with past precedent and sound reason, in favor of permitting a retrial free of the error which caused the reversal of the first conviction.

II. COLLATERAL ESTOPPEL DID NOT BAR RETRIAL FOR FIRST DEGREE MURDER

Petitioner urges (Supp. Brief, pp. 8–12) that the first jury's verdict, that he was guilty of murder in the second degree, precluded retrial on the first degree murder charge, on principles of collateral estoppel, even though that verdict was returned in the same proceeding and was set aside at petitioner's behest.

In *Yates* v. *United States*, 354 U. S. 298, 336, this Court, speaking of the doctrine of collateral estoppel, stated that it "makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision." We be-

lieve that by "subsequent proceedings" the Court meant, consistent with the established understanding of the doctrine,[8] not merely proceedings subsequent in time, but new actions, later brought, which are independent of the prior proceedings.[9] The mere fact, relied upon by petitioner (Supp. Br., p. 11), that the two verdicts as to the murder charge were returned at separate trials, does not alter the fact that they relate to a single count of a single indictment in a single continuing proceeding.

Petitioner's position in securing a reversal of the verdict of second degree murder, because the jury was misled by instructions which were erroneous in that they permitted such a verdict, and yet relying upon some finding thought to be implicit in that same verdict is, of course, basically inconsistent.

We recognize that the doctrines of *res judicata* and collateral estoppel are applicable to the criminal law. Thus, for example, we agreed (Brief for the United States, p. 54) that, had there been an acquittal of a charge of arson at the first trial, that judgment, undisturbed by the appeal, might have precluded the Government from later showing that petitioner set the fires. However, since the petitioner was not acquitted, but convicted, of arson at the first trial,[10] and did

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[8] See Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 13.

[9] This was, indeed, the factual situation to which the Court had reference in *Yates*, where the question was whether findings in a denaturalization proceeding estopped the Government in a subsequent Smith Act prosecution.

[10] This case is therefore entirely distinguishable from *Bartkus* v. *Illinois*, No. 39, this Term, and *Hoag* v. *New Jersey*, No. 40, this Term.

not appeal that conviction, strict application of the doctrine of collateral estoppel would conclusively establish only the fact that petitioner *did* start the fires. Of course, on retrial, the Government, having the burden of proving every element of the crime, again proved petitioner's commission of the arson. Our point is merely that if, under the doctrine of collateral estoppel, any fact was conclusively established by the first trial, it would have to be embodied in the only judgment not set aside (the arson conviction) and this was a fact which would certainly not aid petitioner.

Moreover, we submit that, even if collateral estoppel were applicable to a prior, reversed verdict in the same proceeding,[11] petitioner can point to no evidentiary fact found by the first jury which in any way exculpates him and is not a product of the very error of law which led to the reversal on the first appeal.

Petitioner contends (Supp. Br., pp. 9–10) that the verdict of second degree murder established that he had not caused death in perpetrating arson and that

> * * * [i]f an assumption must be made about the minds of jurors, one would have to assume that they correctly rather than incorrectly interpreted the law expounded to them. A correct interpretation of that law would be that the jurors could return a second degree verdict if they found petitioner had, without premeditation, caused death independently of the commission of arson.

[11] But see *Scott*, *id.* at p. 15.

There are, however, two fundamental objections to petitioner's reasoning. First, it flies in the face of his argument, successfully urged upon the Court of Appeals, that the evidence at the first trial, if it proved any crime, proved only the commission of felony murder, *i. e.*, death in perpetrating arson. Thus, the Court of Appeals wrote, in reversing the first conviction (R. 11–12):

> The quoted testimony, which was undisputed, shows beyond peradventure that Bettie Brown's death was caused by the fire in the house in which her body was found. There was ample evidence to the effect that the appellant set the fire. * * * In the present case, as in the *Goodall* case, all the testimony as to what occurred in the burning house pointed to murder in the first degree and nothing else. Hence there was no reason for a second degree instruction, and giving it was at least technically erroneous.

Second, as we have noted (Brief for the United States, p. 23, fn. 4; p. 45, fn. 18), in finding that petitioner was guilty of arson (count 1) and that the victim died as a result of the fire[12] (count 2), the jury found, at the first trial, all the essential elements of first degree murder under the felony murder statute. There is therefore no basic evidentiary fact implicit in the first jury's finding which in any way estopped the Government from proving guilt of felony murder at the second trial. Petitioner can seek to rely only on the fact

[12] There was no evidence to establish that petitioner could have caused the victim's death by any other means and the jury found petitioner guilty of her murder.

of the verdict itself, and this was the product of the very error which led to its reversal.

III. PETITIONER'S OTHER CLAIMS OF ERROR ARE WITHOUT MERIT

1. *Testimony as to the pre-arraignment questioning.*—Some observations concerning this Court's recent decision in *Mallory* v. *United States,* 354 U. S. 449, and its possible application to the facts of this case seem appropriate. In *Mallory,* this Court reversed the conviction of a "19-year-old lad of limited intelligence" (455) (whose trial was delayed for a year because of doubt as to his capacity to understand the proceedings against him (451)) because the confession introduced in evidence was made during a period of extended delay "during which arraignment could have easily been made in the same building" (455). *Mallory,* we submit, presented circumstances crucially different from those of the instant case, for here, neither petitioner nor Judge Bazelon dissenting below on this issue (R. 182–187), dispute the fact that petitioner was unavailable for arraignment during the time he was questioned.

In *Mallory,* this Court wrote (454–455):

> The arrested person may, of course, be "booked" by police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.
>
> The duty enjoined upon arresting officers to arraign "without unnecessary delay" indicates that the command does not call for mechanical or automatic obedience. Circumstances may

> justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession.

On the facts of this case, see Brief for the United States, pp. 6–11, 56–60, it cannot be said that the law enforcement officials created, designedly or otherwise, the "opportunity for the extraction of a confession." Here the delay in arraigning petitioner was conceded to have been caused solely by his hospitalization and was not brought about by any action of the investigating officers. Cf. *United States* v. *Carignan*, 342 U. S. 36, 44–45.

Moreover, in *Mallory*, the petitioner disclaimed knowledge of anything that happened during the period of the confession (R. 90, No. 521, O. T. 1956), and, at the trial, denied the substance of his confession. Here, petitioner was not only able, on the trial, to recount as to each occasion the substance of what he told the officers (R. 61, 146–147, 148–150), but he testified that what he had told them was the truth "as near as I could" (Tr. 252; 255; 539), and repeated at the trial the same exculpatory story he had told prior to arraignment.

Petitioner contended that, on the morning of May 26, he detected smoke in the basement of the house and saw an unidentified colored man lurking there, who attacked him and stabbed him with a pointed object. According to petitioner, when the assailant left fires were burning in the area and he crawled into

the bathroom, ran some water into the bathtub and put his nose close to the tap so that he could breathe through the smoke. (When the firemen reported to the scene, they found petitioner lying in the bathtub.) This was petitioner's explanation of the origin of the fires, as told to the investigating officers (R. 86, 110) and as he repeated it at the trial (Tr. 495-498, 526–530).

Of course, discrepancies between petitioner's trial testimony and his pre-arraignment statements developed. Four of these are cited by petitioner in his original brief (p. 31, fn. 10) as highly prejudicial,[13] and we shall discuss each of these in relation to petitioner's own testimony at the trial.

The Government sought to establish that petitioner did not tell the investigating officers that Miss Brown had died the night before the fire and prior to his writing the incriminatory letter (admitted in evidence without objection; Tr. 172) which referred to her death. Petitioner claims (Br. 31, fn. 10) that he did tell the officers of her prior death and claims that he was prejudiced because, in summation, "the prosecutor chose to overlook that." The record is to the contrary. Indeed, the reference in summation (R. 152) was not to the testimony of the officers, but rather to petitioner's own testimony at the trial.[14]

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[13] As noted, Brief for the United States, p. 55, fn. 23, three of these instances relate to the questioning on May 28th as to which any objection was specifically waived.

[14] On cross-examination, petitioner testified as follows (Tr. 547–548):

> Q. Now, Mr. Green, ever at any time, either in your first talk with Sergeant Couture, when you next talked

Petitioner also cites, as prejudicial, testimony by the officers to the effect that he initially denied writing any letters. But this fact, as in the previous instance,

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to Sergeant Couture and Sergeant Clarke on the same day, on May 26th, and when you talked to Inspector Kelly and Chief Roberts, and when you talked to Clarke and Couture and Kelly on the morning of May 28th, and when you talked to Dr. Murphy and those other people over there in the late morning hours of May 28th, [the reference is to petitioner's appearance before the coroner's jury] did you ever say that you had found Miss Brown dead; did you?

Mr. FORD. Just a minute. I object to that, particularly as to what is included as of May 26th at the Emergency Hospital and then later at the other. I have no objection to that which includes the 28th, but the 26th I do.

The COURT. The objection is overruled. You may answer the question as asked.

The WITNESS. You say that I never told anybody Miss Brown was dead?

Mr. FLANNERY.

Q. Yes, in substance, that is the answer I want. You never told anyone that, did you?

A. No, I haven't—yes, I had, yes, I had.

Q. Who had you told?

A. I told the four men that were in the dormitory, that were in the room there, not the dormitory, the room there at Gallinger Hospital.

Q. You didn't tell Sergeant Clarke that, did you?

A. No, I hadn't.

Q. You didn't tell Sergeant Couture that, did you?

A. No.

Q. You didn't tell Inspector Kelly that, did you?

A. No.

Q. You didn't tell the deputy coroner when you went over there for the hearing, did you?

A. I saw how things were going.

The COURT. Just answer the question.

The WITNESS. I didn't tell the coroner, no.

was also established by petitioner's own testimony at the trial (R. 149–150).

A third discrepancy relates to the time when the incriminating letter was written. Government witness Kelly testified (R. 73) that Green had said he wrote the letter before he smelled smoke. Sergeant Clarke testified that Green had told him that he had written the letter sometime around midnight (R. 129) and this was consistent with petitioner's trial testimony that he wrote the letter at "approximately 25 minutes to 1:00" (R. 140). Sergeant Couture testified, however (R. 113), that petitioner had told him that "he had written that letter just prior to his detecting the odor of smoke and mailed it." (The fire started at about 7 a. m.) We submit, that on a record which "fairly shrieks the guilt" of the accused (*Lutwak* v. *United States,* 344 U. S. 604, 619), the significance of the single phrase "just prior to" should not be unduly magnified.[15] This testimony was not referred to by counsel in summation[16] and, indeed, no further reference was made to it throughout the remainder of the trial.

Finally, there is only one respect in which petitioner's trial testimony as to his statements to the

[15] This testimony was the only instance of possible prejudice cited in the dissenting opinion below (R. 186).

[16] In fact, the only references to the time the letter was written, made by the government attorney in summation, were (Tr. 577):

> Well, the defendant wrote this letter, by his own admission, ladies and gentlemen, before the fire started. By his own admission, he wrote this letter at 12:35.

and a further reference (Tr. 586) to petitioner's statement that he wrote the letter at 12:35.

officers flatly contradicted their testimony—petitioner denied (Tr. 511) having said that he would blow up the house and blow his brains out before he would be evicted (R. 114, 130). But there was independent testimony by Deputy United States Marshal Cornelius, who sought to serve a notice evicting petitioner the day before the fire, that petitioner had said (Tr. 317): "* * * he didn't want to get put out of there, but if they did put him out of there, they would be sorry." And, in any event, the testimony related only to motive for the crime, otherwise amply established. It did not relate to the actual commission of the crime or the contention most strongly urged by defense counsel, that (contrary to the testimony of the medical experts, R. 27–37) Miss Brown died, not from the fire, but from natural causes. See Tr. 602–604.

Even if it be assumed, therefore, that the introduction of testimony as to the pre-arraignment questioning of petitioner was error, petitioner, having voluntarily repeated the substance of this testimony at the trial, cannot claim that it operated to his prejudice, not merely because the extrajudicial statements were exculpatory,[17] but because petitioner, in effect, ratified them at the trial. Thus, in *Wheeler* v. *United States*, 165 F. 2d 225, 230 (C. A. D. C.), certiorari denied, *sub nom. Patton* v. *United States*, 333 U. S. 829, 830, the court wrote:

> But even if it be said that Patton's contention that his confession was forced from him was not abandoned, so that it was error not to submit to

[17] See *Bram* v. *United States*, 168 U. S. 532; but see *Stein* v. *New York*, 346 U. S. 156, 190–191, fn. 35.

> the jury the question whether he had voluntarily confessed, the error was rendered harmless by the fact that he took the stand in his own behalf at the trial in November, some five months later than the date of the confession which he said was extorted from him by violence, and of his own accord told the jury the story of what happened in the drug store on the morning of June 5th, in all essential respects as it was told in the confession.

Cf. *United States* v. *Wernecke*, 138 F. 2d 561, 564 (C. A. 7), certiorari denied, 321 U. S. 771 (even if seizure improper, defendant's testimony rendered it harmless); *United States* v. *Bayer*, 331 U. S. 532, 540–541.

2. *The Government attorney's rebuttal to the jury.*— Pursuant to the request of the Court at the original oral argument, ten copies of pages 600–605 of the trial transcript, which is a portion of the summation to the jury by defense counsel, were filed with the Clerk. It will be seen therefrom that defense counsel dwelt upon the theme that the consequence of a verdict of guilty was that the petitioner would be electrocuted (there are eight references to "electric chair" or "chair" in the six pages) and stated that "nothing will stop it." (Tr. 600.)

It might also be noted that the conflict between the defense counsel and the prosecutor relating to the role of the jury with respect to the imposition of punishment, evidenced by the summation of defense counsel and the Government's rebuttal, had its origin at the very outset of the trial. At the *voir dire*, the prospective jurors were asked if they were opposed to

capital punishment and the following colloquy took place (Tr. 17–18):

Prospective Juror WEBER. I wouldn't like to take part in sentencing anyone to death. I wouldn't like it on my conscience.

Mr. FORD. May we then at this time, Your Honor, inform this lady that a verdict of guilty in this case—it is mandatory that he go to the electric chair.

Prospective Juror WEBER. It is?

Mr. FORD. Yes, it is. That is the status of this case, that if there is a verdict of guilty, the Court has no choice. There is no one that has any choice but that he must go to the electric chair.

Mr. FLANNERY. But it should be pointed out, too, to the prospective jurors that that is not their function. It is the Court's function to sentence in any case.

Mr. FORD. Oh, yes, I didn't say it was their function, but that must happen. No one can intervene in it, not even the Court.

Now, with the lady juror knowing that, how do you feel now? Would you rather serve or not serve?

The COURT. Could you conscientiously determine the death sentence if you felt the case, by the facts and circumstances shown, required that? If you have any doubt about it, you should say so.

Prospective Juror WEBER. I suppose I could serve.

* * * * *

The COURT. What do you say?

Prospective Juror WEBER. I will serve if I am chosen.

> The COURT. Then there will be no reluctance on your part in finding him guilty, which will require the death penalty, if the facts and circumstances indicate that you should do so, when you understand the law?
>
> Prospective Juror WEBER. Yes, sir.[18]

In addition to the authorities cited, Brief of the United States, p. 65, holding that remarks of Government counsel which would otherwise be prejudicial error must be read with reference to matters raised by opposing counsel's argument, see also *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, 237.

CONCLUSION

For the reasons stated in our original brief and in this brief, it is respectfully submitted that the judgment of the court below should be affirmed.

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SEPTEMBER 1957.

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[18] The prospective juror was not chosen from the panel.

U. S. GOVERNMENT PRINTING OFFICE: 1957